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ARIZONA
LAW REVIEW

VOLUME 3 WINTER 1961 NUMBER 2

SUBDIVISION TRUSTS AND THE BANKRUPTCY ACT

WILLIAM H. REHNQUIST*

Farmer Jones is ready, at long last, to sell his one hundred sixty acre piece of ground if he can get a good enough price for it. Home-builder Smith is willing to pay Jones that good price, since the land is on the edge of a growing city and prime subdivision material. But Smith's small working capital will not permit him to make a large down payment, and for the deferred annual payments he will depend to a large extent on income from the sale of houses on the lots into which the one hundred sixty acres have been subdivided. Smith can pay, but from the beginning of the transaction he must have the fullest sort of use of the land, including the right to re-sell parts of it free and clear of Jones' lien. Usually a developer such as Smith will want most if not all of the following rights as of the close of escrow:

(a) The right to subdivide the property into lots by recording a plat;

(b) The right to dedicate streets, alleys, and other easements immediately after making the down payment, in order to meet the conditions imposed by the various governmental bodies concerned with subdivision;

(c) The right to obtain an outright release from the vendor's lien of various parcels of the property as soon as an agreed pro rata portion of the purchase price, called a "release price," is paid;

(d) The right to place upon these various parcels, before any release price has been paid, an institutional construction mortgage which will be superior to the lien of the vendor. The proceeds of this construction mortgage will be used to build a house.

Smith's requirements are difficult to provide for under either of the two traditional real property security instruments: a deed to Smith with a mortgage back to Jones, or an agreement of sale with title

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* See Contributors' Section, p. 263, for biographical data.

retained in Jones until final payment. In Arizona, the device most frequently used to meet the requirements of this transaction is the subdivision trust. It is perhaps only natural that the remarkable versatility of the trust relationship should have led to its use here as well as in the countless other situations to which it has been adapted.

Where the subdivision trust is utilized, the Seller conveys the property to a Trustee, and Buyer, Seller, and Trustee enter into a trust agreement. This agreement provides for the payment of the purchase price by Buyer through Trustee to Seller, and provides that Buyer, when not in default, shall have the right to direct the Trustee to record a subdivision plat, make dedications, execute deeds to parcels which have been released, and deed parcels to Buyer for the purpose of placing construction mortgages on the parcels. In effect, the trust agreement is substituted for the vendor's lien under an agreement of sale as the Seller's security. Practically speaking, the Seller gives up some of the security of a traditional mortgage or agreement of sale transaction in order to get a higher price; the Buyer is willing to pay a higher price if he can obtain more flexibility in his right to use and dispose of the property while he pays for it.

Notwithstanding the wide popularity of this type of trust, and its marked advantages over alternative methods of administering the seller-developer relationship, certain of its incidents raise questions under the federal bankruptcy law. Customarily, the only instrument in the entire transaction which is recorded is the warranty deed from the Seller to the Trustee, delivered at the commencement of the trust. The agreement of sale, the trust agreement, and any subsequent assignment by Buyer or Seller of their rights under the trust, are not recorded. Under these circumstances, the thoughtful practitioner will naturally examine with care whether any of these transfers evidenced by unrecorded instruments could be attacked by a trustee in bankruptcy on the grounds of incompleteness.

Various motives have doubtless induced the avoidance of recording: desire to insure a clean record title, with no doubt of the Trustee's powers to make the necessary dedications; desire not to fully divulge the terms of an individual transaction; desire to keep subsequent transfers anonymous. But these would be dearly bought if the securing of them caused a serious risk of successful attack by the trustee after one of the parties to the trust takes bankruptcy.[1]

[1] In Arizona, the protection of the recording act may be obtained without disclosing either the purchase price or other specific terms, so long as reference is made in the recorded memorandum to the location of the instrument containing these. Carley v. Lee, 58 Ariz. 268, 119 P.2d 236 (1941). It seems probable, however, under the reasoning of this case, that the escrow agent or Trustee would be obligated to give unlimited public access to its files containing the full trust instrument in order for a memorandum recording of that instrument to be sufficient.

Three examples will illustrate the way in which such an attack might arise:

(a) The Buyer takes bankruptcy, and the trustee of his estate challenges the secured status of the Seller under the trust agreement;

(b) The Seller takes bankruptcy following a transfer by him to X of his beneficial interest under the trust. This transfer was effectuated by an unrecorded instrument from him to X, filed with the Trustee of the subdivision trust, more than four months prior to the filing by Seller of his petition. Seller's trustee challenges the assignment to X;

(c) The Buyer takes bankruptcy following a transfer by him to Y of his beneficial interest under the trust. This transfer is effectuated in the same manner and at the same time as the one described in the preceding paragraph, and is challenged by the Buyer's trustee.

In each of these cases, it will be remembered, the only recorded instrument in the chain of title after Seller acquired the property is the deed from Seller to Trustee. To keep the discussion manageable, it should also be assumed that each of these transfers was for an "antecedent debt" within the definition of § 60(a)(1) of the Bankruptcy Act.[2]

The trustee, of course, bases his attack on the strong-arm clause of § 60(a), reading as follows:

(1) A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

(2) For the purposes of subdivisions (a) and (b) of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not so perfected

[2] In Corn Exchange Nat. Bank & Trust Co. v. Klauder, 318 U.S. 434 (1942), the Supreme Court held that although an incompleted assignment of accounts receivable was given to the creditor for contemporaneous consideration, the effect of § 60(a), by which the assignment would be deemed to have been made immediately before bankruptcy was to likewise make the consideration for it an "antecedent debt." Whether this holding would extend to outright transfers, as well as to transfers as security, is beyond the scope of this article.

against a bona fide purchase, or if any transfer of other property is not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this title, it shall be deemed to have been made immediately before the filing of the petition.

The question of whether the original Seller under the trust is protected in his security against attack by the Buyer's trustee in bankruptcy was answered in the affirmative by the United States Court of Appeals in *Barringer v. Lilley*.[3]

There Barringer had been the seller under a subdivision trust of property being developed in Phoenix, and therefore the state law, to the extent that state law was applicable, was that of Arizona. The trust agreement was basically of the type described at the beginning of this article, with a few added fillips thrown in to cast dust in the eyes of pursuing creditors. The buyer's assignee ultimately took bankruptcy, and in the ensuing proceedings the Referee refused to give the seller's claim for the unpaid purchase price under the subdivision trust anything more than the status of an unsecured claim. From the order of the District Court confirming the Referee's order, the seller successfully appealed.

Though there had been numerous assignments of the buyer's interest under the *Barringer* trust, there had been none of that of the seller. The question before the appellate court, then, was the basic one of whether the seller's security interest created by the original trust instruinstrument was good against the buyer's trustee. The predecessor of the present § 60 of the Bankruptcy Act, in effect at the time of *Barringer*, read as follows:

(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

(b) If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition or before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

[3] 96 F.2d 607 (9th Cir. 1938).

The then applicable recording statutes of Arizona were identical with the present provisions.[4]

The Court of Appeals held that the trustee in bankruptcy, representing general creditors, could not rely on the state recording statute to invalidate the seller's security, since the general creditors dealing with the buyer had dealt with one whose interest in the property was not of record. The Court held that the fact that the record title to the property stood in the name of a trustee was notice to the entire world that the buyers under the trust had no interest of record in the property.

As a second and alternate ground for its holding, the Court held that as between the parties to the transaction, the unrecorded trust agreement establishing the seller's security was good, and it could not be attacked by the trustee since it was necessary for him to rely on the same instrument to establish the interest of the bankrupt in the property.

In placing the *Barringer* case in present perspective, it is important to note that it was decided before the drastic amendments to the Bankruptcy Act in 1938 and subsequent years became effective. These amendments to § 60 have spelled out in much greater detail the tests to be applied in determining whether recording is required in order that a transfer may be deemed complete for purposes of computing the four-months period. A transfer of realty is now deemed complete where no bona fide purchaser from the bankrupt could acquire rights in the transferred property superior to those of the transferee; a transfer of personalty is tested generally by whether a judgment creditor could have obtained rights in the transferred property superior to those of the transferee.

So far as the subdivision trust is concerned, the changes just mentioned do not change the basic test applicable at the time of *Barringer*: Was recording necessary to complete the transfers under state law? But other language since added to § 60 has a more pervasive effect on the *Barringer rationale*. § 60(a)(3), added in 1950, provides:

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[4] ARIZ. REV. STAT. ANN. § 33-411A (1956): "No instrument affecting real property is valid against subsequent purchasers for valuable consideration without notice, unless recorded as provided by law in the office of the county recorder of the county in which the property is located."

ARIZ. REV. STAT. ANN. § 33-412 (1956): "All bargains, sales and other conveyances whatever of lands, tenements and hereditaments, whether made for passing an estate of freehold or inheritance or an estate for a term of years and deeds of settlement upon marriage, whether of land, money or other personal property, and deeds of trust and mortgages of whatever kind, shall be void as to creditors and subsequent purchasers for valuable consideration without notice, unless they are acknowledged and recorded in the office of the county recorder as required by law, or where record is not required, deposited and filed with the recorder."

> The provision of paragraph (2) of this subsection shall apply whether or not there are or were creditors who might have obtained such liens upon the property other than real property transferred and whether or not there are or were persons who might have become bona fide purchasers of such property. 11 U.S.C. § 96(a)(3) (1938).

The Court of Appeals in *Barringer* held that the trustee could not challenge the secured status of the seller because as successor to the bankrupt he claimed under the same instrument. But certainly it is clear under the present act, if it were not before, that the trustee for purposes of attacking a preference does not stand in the shoes of the bankrupt, but in the shoes of a hypothetical bona fide purchaser or judgment creditor. If there is to be an estoppel against the trustee in this situation, it must be because a judgment creditor or bona fide purchaser would be estopped, and not simply because the bankrupt would have been estopped.

Thus, while there can be no doubt that the unrecorded trust instrument was, as stated by the Court of Appeals, good as between the parties thereto and their successors in interest with actual notice, this does not answer the question of whether or not it was good as against a bona fide purchaser from, or a judgment creditor of, the buyer. The Court cites the case of *Dickerson v. Colgrove*[5] in support of the doctrine that the buyer under the trust agreement was estopped to challenge the seller's secured status, since the buyer himself claimed under the trust agreement. But this appears to be only another way of stating that the instrument was good as between the parties themselves.

The other ground relied upon by the Court, the fact that record title was in a trustee designated as such, is more persuasive. It is certain that no one dealing with the buyer who had examined the state of the record title to the property would have been under the impression that it was in the buyer. Such record title is, under the law of Arizona as elsewhere, notice to all those who are under a duty to inquire. *Mountain States Tel. & Tel. Co. v. Kelton.*[6] Elsewhere it has been stated that although a judgment lien attaches to the title of the judgment debtor under an unrecorded deed, interests of both debtor and creditor could be defeated by a bona fide purchaser of the record title.[7]

But to conclude, from the fact that record title was in a trustee, that the transaction was analogous to a mortgage deed of trust given

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[5] 100 U.S. 578 (1879).
[6] 79 Ariz. 126, 285 P.2d 168 (1955).
[7] Emerson-Brantingham Implement Co. v. Cook, 165 Minn. 198, 206 N.W. 170 (1925).

to secure the seller's unpaid balance, as does the Court in *Barringer,* is to press analogy too far. The deed under which the trustee took title in *Barringer,* like all deeds in subdivision trust transactions in Arizona, was a warranty deed without any indication that it was taken as security for anything, and without any of the provisions commonly found in the trust deed which is a form of mortgage.

The basic question which must be resolved under the bankruptcy law as it stands today is whether instruments retaining a security interest to the Seller, or instruments transferring the Seller's or Buyer's beneficial interest under the trust, are required to be recorded under applicable Arizona statute. The fact that *Barringer v. Lilley* was decided prior to significant changes in the Bankruptcy Act, and the further fact that most of its reasoning is directed to the rights of the bankrupt, rather than to a bona fide purchaser from or a judgment creditor of the bankrupt, make it less than conclusive as an authority on this point. In addition, the situation where the Seller or Buyer has transferred his beneficial interest under the trust is distinguishable from *Barringer.* Unlike the situation in that case, transfers of the beneficial interest under the trust after its creation are effected by instruments separate and distinct from the trust agreement and therefore the trustee in bankruptcy would not be required to attack the instrument under which he claims title.

The law in other jurisdictions is by no means uniform on the general question of whether a transfer of an equitable interest in land is subject to the provisions of the Recording Act in the particular jurisdiction. The cases are collected in § 38 and § 49 of 45 Am. Jur., "Records and Recording Laws". In Arizona, however, the Supreme Court without much discussion appears to have confined the provision of the Recording Act to legal interests in land by its decision in *Jarvis v. Chanslor & Lyon Co.*[8]

In that case X and Y entered into an agreement providing for the sale of real property from X to Y. X delivered his deed to the property to the escrow agent. Before the close of the escrow, and while the record title to the property was still in X, Y executed a deed conveying his equity in the property to Z. This deed was also delivered to the escrow agent. After this delivery, but before either deed was recorded, W, a creditor of Y, attached the property. After the attachment, both of the deeds were recorded.

On appeal to the Supreme Court of Arizona from a Superior Court judgment refusing to enjoin a sale by the attaching creditor, the Supreme Court reversed. The Court said:

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[8] 20 Ariz. 134, 177 Pac. 27 (1919).

> We have no statute that requires the escrow deed from [X] to [Y] to be placed of record before its second delivery. ¶ 2080, Civil Code of 1913 [ARIZ. REV. STAT. ANN. § 33-412 (1956)] does not cover the case. Nor would the recordation or the lack of it affect the right of the grantee therein to transfer his equitable interest or make his interest less or more amenable to attachment by his creditors. It was liable to be subjected to his debts by attachment or execution as long as it was his, but no longer.

It is arguable from a careful reading of the foregoing language that the Court was not actually addressing itself to the question of whether the deed from Y to Z ought to have been recorded in order to put Y's equitable interest beyond the reach of his attacking creditor. Nonetheless, courts are not usually wont to so narrowly confine their previous statements, and there can be no doubt as to the *holding* of the case. *Jarvis* stands for the proposition that in Arizona a transfer of the Buyer's equitable interest under an agreement of sale is not subject to the Recording Act.

The holding is consistent with at least one reasonable reading of the language of the Recording Act, which language suggests that its terms are confined to *traditional legal estates* in land:

> All bargains, sales and other conveyances whatever of *land, tenements, and hereditaments, whether made for passing an estate of freehold or inheritance or an estate for a term of years* . . . shall be void as to creditors and subsequent purchasers for valuable consideration without notice, unless they are acknowledged and recorded in the office of the county recorder as required by law . . . . ARIZ. REV. STAT. ANN. § 33-412 (1956) (emphasis supplied)

Whatever difficulties may be presented by an effort to classify the various beneficial interests under the trust as "realty" or "personalty" it is clear that neither beneficiary has legal title to the land. Each has an interest which is "equitable" in the sense that that term means an interest separated from the legal title to the property. If the Recording Act by its terms applies only to interests which *include* legal title, this could be the implicit basis for the *Jarvis* holding.

Jarvis is likewise consistent with the decision of the Territorial Supreme Court in *Luke v. Smith*,[9] holding that the unrecorded equitable lien of a partner for moneys advanced to improve partnership real property was protected against a purchaser at an execution sale.

Further analysis of the beneficial interests in terms of whether either or both are "real property" is by itself inconclusive, although the case for requiring recordation of a transfer of the Buyer's interest under the trust is stronger than that for such a requirement in connection with the transfer of the Seller's interest.

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[9] 13 Ariz. 155, 108 Pac. 494 (1910).

The Seller's interest under a subdivision trust is quite unlike any recognized interest in real property. He holds neither legal nor record title to the land; the Trustee has these. He does not, under the theory of equitable conversion, have the customary rights of a purchaser of real property; if anyone has these, it is the Buyer. The Seller possesses, so long as the Buyer is not in default, only the right to receive periodic payments under the trust agreement. It is very difficult to transmute this into an interest in real property within even the broadest interpretation of the Recording Act.

The Buyer's rights are not so easily disposed of. He is acquiring the property, and has the right of possession and occupancy for many purposes in connection with its development. Clearly he would be the equitable owner of the property were it not for the provisions in the trust agreement that the interests under the trust of both Buyer and Seller are personalty.

The *Restatement of Trusts,* which the Supreme Court of Arizona has held will be followed by it in the absence of statute or precedent to the contrary,[10] draws the following distinctions between the nature of beneficial interests:

> § 130. Except as stated in § 131 . . .
> (b) if the trust property is real property, the interest of the beneficiary is real property unless the interest of the beneficiary is so limited in duration that if it were a legal interest it would be personal property . . . .
>
> § 131. Equitable Conversion.
> (1) If real property is held in trust and by the terms of the trust a duty is imposed upon the trustee to sell it and hold the proceeds in trust or distribute the proceeds, the interest of the beneficiary is personal property.

The Seller's interest under a subdivision trust does not fit precisely into the definition given in § 131, but this is because the property has already been sold and the Trustee's duty is to collect and disburse the proceeds. The Seller's interest under a subdivision trust is, a fortiori, personal property by the standards of § 131. Just as clearly, the Buyer's interest under the trust will be real property under the provisions of § 130.

However, even if it were not for *Jarvis v. Chanslor & Lyon, supra,* the fact that an interest under a trust be held "real property" in a general sense does not necessarily mean that an instrument transferring

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[10] Ingalls v. Neidlinger, 70 Ariz. 40, 216 Pac. 387 (1950). Of course Jarvis v. Chanslor & Lyon, 20 Ariz. 134, 177 Pac. 27 (1919) would be a contrary precedent if the Restatement was to require the conclusion that the transfer of a vendee's interest in an agreement for sale of land was subject to the Recording Act.

it must be recorded. As previously pointed out, a literal reading of the Arizona recording statute supports the view that it applies only to *legal estates* in land, a term by no means as broad as "real property."

There is authority in other jurisdictions holding that beneficial interests under other types of land trusts are personalty. The interest of a beneficiary in a trust of real property has been held to be personalty for purposes of a Massachusetts succession tax in *Dana v. Treasurer*[11] followed in *Priestly v. Burrill.*[12] The Wisconsin court has held otherwise for purposes of the Wisconsin inheritance tax.[13] A like interest was held to be personalty for purposes of determining the right of one of the beneficiaries to a partition of the real property in *Aronson v. Olsen.*[14]

In *Aronson* the Supreme Court of Illinois relied on a declaration in the trust agreement that the beneficial interest should be regarded as personalty. However, in *Gordon v. Gordon,*[15] the same court held that for purposes of conflicts of law jurisdiction a beneficiary's interest in a trust of real property was itself real property in the absence of an express contrary provision in the trust instrument. These decisions raise the question of how much weight, in determining the question of whether property is realty or personalty, a court will give to the declaration of the parties that it is one or the other. As previously pointed out, the typical Arizona subdivision trust provides that the interests of the beneficiaries shall be deemed personalty.

Conceivably a court would be more willing to permit the beneficiaries to determine the nature of their own interests with regard to what remedies should be available *inter sese,* as in *Aronson, supra,* than it would be with regard to whether the court has jurisdiction of the controversy at all, as in *Gordon, supra.* The Massachusetts holdings cited above suggest that even without such a stipulation in the trust instrument the interest of a beneficiary is personalty for some purposes. Under these circumstances, unless the policy of the Recording Act would be impaired or frustrated by such a holding, there appears no good reason why the parties should not be allowed to stipulate in the type of subdivision trust under discussion that the interests of the beneficiaries should be personalty. The Arizona court has said as much where dealing with the related question of whether or not improvements are realty or personalty, but in so saying has reserved the critical question of whether such a stipulation between the parties would be good as against third persons.[16]

[11] 227 Mass. 562, 116 N.E. 941 (1917).
[12] 230 Mass. 452, 120 N.E. 100 (1918).
[13] *In re* Petit's Estate, 252 Wis. 94, 31 N.W.2d 140 (1948).
[14] 348 Ill. 26, 180 N.E. 565 (1932).
[15] 6 Ill. 2d 572, 129 N.E.2d 706 (1955).
[16] Voight v. Ott, 86 Ariz. 128, 341 P.2d 293 (1959); Marcos v. Texas Co., 75 Ariz. 45, 251 P.2d 647 (1952).

This discussion could be extended to cases dealing with the statute of frauds and similar rules of law which require a determination whether a particular interest is real property. Yet it is clear from what the courts have done that what may be "real property" for one purpose may not be for another. The situation may be fairly summarized by saying that on principle the Seller's interest under a typical Arizona subdivision trust is plainly personal property by any test, and an instrument reserving it or transferring it is not within the recording statutes. The Buyer's interest is probably "real property" in most senses of the word, but this does not conclusively answer the question of whether on principle an instrument transferring it is within the terms of the Recording Act. Counterbalancing the fact that the Buyer's interest is undoubtedly "real property" for some purposes are the declarations that the interest is personalty and the fact that a textual interpretation of the Arizona Recording Act may restrict its coverage to interests in land which include legal title.

With the matter standing thus apart from authority, there is every reason for thinking that the case of *Jarvis v. Chanslor & Lyon* is and will remain good law in Arizona. There are no compelling policy considerations or arguments on principle which suggest that the Supreme Court of Arizona would be willing to examine it, particularly since it deals with an area of the law where stare decisis is of peculiar importance.[17]

If the foregoing analysis is correct, there can be little doubt that the Court in *Barringer* reached a result which is still correct today. Likewise, the same result should obtain in the case of an attack by a trustee in bankruptcy against a transfer of either the Seller's or Buyer's beneficial interest under the trust to a third person. Nonetheless, this reappraisal of the *Barringer* reasoning serves a purpose even though it only confirms the result of that case. The landmark opinion of the Supreme Court of the United States in *Corn Exch. Nat'l Bank & Trust Co. v. Klauder*,[18] was important not merely for its holding, but for the philosophy which it expressed. The Bankruptcy Act had for years been subject to judicially engrafted exceptions in favor of debatably secured claimants who would have suffered hardship from a literal application of the Act. Part of this may have been the fault of the rather imprecise statutory tests which the Act embodied prior to its amendment in 1938 and later years. The *Barringer* opinion reflects that earlier judicial climate. The Supreme Court in *Klauder*, rightly or wrongly, chose a drastic, literal interpretation of the Act

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[17] White v. Bateman, 89 Ariz. 110, 358 P.2d 712 (1961).
[18] 318 U.S. 434 (1942).

in a situation where an equally reasonable interpretation would have reached the opposite result.[19]

Though the recent case of *Lewis v. Manufacturers Trust Co*,[20] decided January 9, 1961, may furnish an outward limit to the Court's literal reading of the Act, the combined change in the wording of the bankruptcy law and in the attitude of the court of last resort charged with its interpretation make decisions rendered under the old regime somewhat precarious authority. But since the Bankruptcy Act makes state law determinative in this situation, *Barringer* will continue to be reliable authority so long as the Arizona law exempts equitable interests in real property from the provisions of the state Recording Act.

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[19] The argument for the opposite result will be found in the opinion of Judge Jones, when the Klauder case was in the Third Circuit, in *In re* Quaker City Sheet Metal Co., 129 F.2d 894 (3d Cir. 1942). This was adopted by Justice Roberts as his dissent when the case was decided by the Supreme Court.

[20] 364 U.S. 603 (1961).

CONGRESSIONAL CONTROL OVER SUITS TO RESTRAIN THE ASSESSMENT OR COLLECTION OF FEDERAL TAXES

A Study of the Supreme Court's Interpretation of Section 3224 of the Revised Statutes

JAMES J. LENOIR*

The particular problem of this paper is but a small part of the controversial question: To what extent may Congress control the jurisdiction of the federal courts? It is our purpose to examine the manner in which the Supreme Court has interpreted section 3224 of the Revised Statutes[1] which, when first enacted March 2, 1867,[2] read as follows: "No suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court."

This provision was adopted as an amendment to the Act of July

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* See Contributors' Section, p. 263, for biographical data.

[1] REV. STAT. §3224 (1875). Section 3224 was incorporated in Section 3653 (a), Internal Revenue Code 1939; and re-enacted in Section 7421 (a), Internal Revenue Code 1954.

Section 7421 (a) provides that, with the exception of certain deficiency procedures in the case of income, estate and gift taxes, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Section 42-204 B of the Arizona Revised Statutes provides: "No injunction shall issue in any action or proceeding in any court against the state or against any county, municipality or officer thereof, to prevent or enjoin the collection of any tax imposed or levied." As will be noted, this section corresponds to the federal law just quoted. In its own sphere of control the state legislature is endeavoring to curtail the jurisdiction of the state courts in matters of tax collection. An examination of the interpretations of this statute by Arizona courts indicates that it has been subjected to judicial modification somewhat similar to the construction given Section 3224 by the Supreme Court. For a discussion of similar statutes of other states, see HELLERSTEIN, STATE AND LOCAL TAXATION 643-46 (2d ed. 1961).

[2] Ch. 169, §10, 14 Stat. 475 (1867).

13, 1866,[3] which forbade the maintenance of any suit for the recovery of any tax, alleged to have been erroneously or illegally assessed or collected, until after an appeal to the administrative authorities, in the manner prescribed. Later, the amendment was incorporated into the Revised Statutes as a separate section, with but one change: the revisers added the word "any" before the word "tax". On its face the provision seems unambiguous, and not likely to prove difficult of application. But the cases show that the Court has read qualifying principles and conditions into the act. What criteria for applicability has it laid down? To what extent has section 3224 curtailed the previously exercised jurisdiction of the courts? What theories did the Court assert as to the power of Congress? Its own power? What was the method of reasoning of the Court? It is to answer these questions that the present study has been made.

One may inquire, first of all, as to the basis of the power of Congress to enact section 3224. In so far as the provision is considered as a regulation of the jurisdiction of the courts, authorization must be found in Article III of the Constitution which provides for the establishment by Congress of inferior (federal) courts, and the making of "exceptions" and "regulations" with respect to the appellate jurisdiction of the Supreme Court. Considered as a measure to aid the assessment and collection of taxes, the act must be justified by Article I, section 8, which gives Congress the power to lay and collect taxes.

It is not enough, however, for the statute merely to treat of matters within the delegated powers of Congress. To be constitutional it must meet the additional test of not going beyond the limitations which other provisions of the Constitution (such as the provisions guaranteeing individual rights) have placed upon Congress. Here again the Court has approved the statute whether one considers it from the point of view of (1) denial of a remedy or (2) support of a summary administrative procedure in the assessment and collection of taxes. The power of Congress with respect to remedies in tax

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[3] Internal Revenue Act. Ch. 184, 14 Stat. 152 (1866), which provided, in section 19:

No suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury, established in pursuance thereof, and a decision of said Commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: *Provided*, That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal.

Quoted in Snyder v. Marks, 109 U.S. 189, 191 (1883).

cases was considered by the Court in *Snyder v. Marks.*[4] The significance of section 3224 in this connection was declared to be that of making the remedy which Congress had provided in another section the exclusive one:

> The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it. Such has been the current of decisions in the circuit courts of the United States, and we are satisfied it is a correct view of the law.[5]

Another case involving the power of Congress over remedies in tax matters, though not directly concerned with the interpretation of section 3224, was that of *Collector v. Hubbard.*[6] The question here was the right of Congress to change a remedy by imposing additional requirements as a prerequisite to bringing a suit to recover a tax paid under protest. Hubbard instituted his suit when a judicial proceeding was open to him as a remedy. Before the suit was called, Congress passed the act of 1866, mentioned above,[7] requiring the compliance with a certain administrative procedure before a judicial action could be maintained. As Hubbard had not fulfilled these requirements, his suit was dismissed. He secured a judgment in the state courts whereupon the collector took an appeal to the United States Supreme Court, arguing that the plaintiff had no vested right to recover money illegally taken by the collector, that the whole right to sue came by necessary implication from the revenue laws, and that the authority to sue could at any time be qualified or even taken away by Congress which gave it.

The Court in substance approved the contention of the collector:

> Remedies of the kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the lawmaker, as the taxpayer cannot have any vested right in the remedy granted by Congress for the correction of an error in taxation.[8]

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[4] 109 U.S. 189 (1883).

[5] *Id.* at 193. The Court cited the following cases: Howland v. Soule, 12 Fed. Cas. 743 (No. 6800) (C.C. Cal. 1868); Pullan v. Kinsinger, 20 Fed. Cas. 44 (No. 11463) (C.C.S.D. Ohio 1870); Robbins v. Freeland, 20 Fed. Cas. 863 (No. 11883) (C.C.E.D. N.Y. 1871); Delaware R.R. v. Prettyman, 7 Fed. Cas. 408 (No. 3767) (C.C. Del. 1872); United States v. Black, 24 Fed. Cas. 1151 (No. 14600) (C.C.S.D. N.Y. 1874); Kissinger v. Bean, 14 Fed. Cas. 689 (No. 7853) (C.C.E.D. Wisc. 1875); United States v. Pacific R.R., 27 Fed. Cas. 399 (No. 15984) (C.C.E.D. Mo. 1877); Alkan v. Bean, 1 Fed. Cas. 418 (No. 202) (C.C.E.D. Wisc. 1877).

[6] 79 U.S. (12 Wall.) 1 (1870).

[7] Internal Revenue Act. ch. 184, 14 Stat. 152 (1866).

[8] Collector v. Hubbard, 79 U.S. (12 Wall.) 1, 14 (1870).

From these and similar cases it appears that the Court recognizes in Congress a plenary power over the remedies to be accorded to taxpayers for the correction of errors in taxation. The constitutional guarantees of individual rights are satisfied if at least one adequate remedy is provided. Moreover, Congress may postpone the existing remedy until after the tax has been paid (the import of section 3224); that is, it may set up a summary administrative procedure in the assessment and collection of taxes. Whether, under existing law, this summary action of the taxing officials is always beyond the province of the court until the tax has been paid (that is, whether there are no exceptions to the application of section 3224) will be considered later. Let us now examine the theory by which the Supreme Court justifies this summary administrative action in the collection of taxes.

The first expression of such a theory may be found in *Dows v. City of Chicago*,[9] a case in which section 3224 had no application. In this case a taxpayer sought to invoke the equity jurisdiction of the Court in restraining the collection of a municipal tax alleged to be illegal and void by state law. In refusing the injunction the Court made this comment upon the power of taxation of the several states, and the extent to which its exercise was free from judicial control:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.[10]

Five years later, in *Cheatham v. United States*,[11] the Court again had occasion to refer to the respective powers of the government and the courts with regard to the means adopted for enforcing the collection of taxes. The question was whether the plaintiff could maintain a court action for the recovery of taxes already paid, although he had not made an appeal to the administrative authorities, in accordance with the statute of 1866 which made such appeal a necessary prerequisite to a suit at law. In deciding against the plaintiff the Court commented upon the general power of the government over

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[9] 78 U.S. (11 Wall.) 108 (1870).
[10] *Id.* at 110.
[11] 92 U.S. 85 (1875).

the collection of its taxes, and the absence of any such general power in the courts to hinder or control the government in this matter. The Court said:

> All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes, and to be rigid in the enforcement of them. . . .
>
> It will be readily conceded, from what we have here stated, that the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues.
>
> If there existed in the courts, state or national, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary.[12]

In both of these cases the Court took a broad view of the power of the government in taxing matters, even when, as in *Dows v. City of Chicago,* there was no specific statutory limitation upon the Court, but jurisdiction was sought upon equitable grounds. It would appear that, in the Court's view, the principle of "Collect first, and adjudicate afterwards" is necessarily implied from the existence of the government itself. It is plain that the Court will not deny this power to the government and, if limitations are imposed, they must be justified on some other grounds.

This view was reaffirmed in *State Railway Tax Cases*[13] in which the Court not only discussed the nature and scope of the power of a government over taxation but also, by way of illustration, referred to section 3224 and the political philosophy on which it is based. Because of this reference and because these statements have been in large part quoted in later decisions, we shall reproduce them here:

> The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the General Government, which in both branches is founded upon the idea of appeals within the executive departments. . . . But there is no place in this system for an application to a court of justice until after the money is paid.
>
> That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Rev. Stat. sect. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the

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[12] *Id.* at 88-89.
[13] *Id.* at 575.

> process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice.[14]

In *Snyder v. Marks*[15] the assertion was again repeated that the government possessed the right "to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues."

Having thus found the prohibition imposed by section 3224 to rest upon the theory of the plenary power of any government to protect its revenues, let us consider the decisions of the Court determining the applicability of the act. In spite of its general wording there has never been any question but that the act applies to federal, and not to state, taxes.[16] Apparently this is because of the nature of our federal government whereby Congress may exercise only delegated powers; the power of a state over the collection of purely state taxes is one of the reserved powers of the states with which Congress may not interfere as of right. That the act places a restraint upon a state as well as a federal court, however, as concerns federal taxes, does not offend the federal principle, for in such a case the state court is merely told not to interfere with the federal agencies of collection.

Though the act applies only to federal taxes, what is the meaning of the word "tax"? Does it comprehend a tax alleged to be illegal or unconstitutional? This question was early raised in *Snyder v. Marks*, where the argument was advanced that a tax alleged to be illegal or unconstitutional did not come within the meaning of the act, and that the Court was therefore not restrained from granting an injunction. The Court found little difficulty in denying this contention, basing its decision upon an interpretation of section 3224. "This enactment in section 3224 has a no more restricted meaning," said the Court, "than it had when, after the act of 1867, it formed a part of section 19 of the act of 1866, by being added thereto."[17]

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[14] *Id.* at 613-14.

[15] 109 U.S. 189, 194 (1883).

[16] 28 U.S.C. §1341 (1948) provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." For a construction of this section see Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952).

[17] 109 U.S. 189, 192 (1883).

Applying the rule of construction that the meaning of a word is to be discovered from its context, the Court concluded that "tax" had the same broad meaning in the amendment as in the original act. Since "tax" in the original act expressly envisaged taxes which were alleged to have been erroneously or illegally assessed or collected, it followed that section 3224 forbade injunctive relief in the case of such taxes.

Without at this time entering into a discussion of the relation of section 3224 to previously existing equity principles, we may note that before the enactment of that section the Court had, on several occasions, passed upon the question as to whether an injunction would lie against a government official seeking to collect a tax which the complainant alleged to be illegal. When the alleged illegality or unconstitutionality was the sole complaint the Court had uniformly denied the injunction on the ground that the circumstances alleged were insufficient to bring the case within its equity jurisdiction. The principles which were generally recognized as determining the equity jurisdiction of the Court were as follows: If a plain, adequate, and complete remedy may be had at law, equity will not intervene.[18] Circumstances justifying intervention in tax cases are: (1) When the enforcement of the tax would lead to a multiplicity of suits; or (2) produce irreparable injury; (3) in the case of real estate when the assessment or collection would place a cloud upon the complainant's title; and (4) when there is allegation of fraud.[19]

However, in *Snyder v. Marks* the Court did not refer to these earlier decisions, but based its opinion on section 3224 alone. Later cases, following *Snyder v. Marks*, in which the Court refused to grant an injunction on the ground that the sole objection to the application of section 3224 was the alleged unconstitutionality of the revenue act in question were *Dodge v. Osborn*[20] and *Bailey v. George*.[21] Nevertheless, in these latter cases the Court implied that extraordinary and entirely exceptional circumstances would render the act inapplicable, a qualification not hinted at in the earlier case.

Until *Lipke v. Lederer*[22] no further attempt was made to limit the application of section 3224 by restricting the meaning of the word "tax" as used in that act. *Snyder v. Marks* had laid down the general rule that if the exaction was imposed by an officer of the gov-

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[18] See DOBIE, FEDERAL JURISDICTION AND PROCEDURE 660 (1928).
[19] See 4 COOLEY, TAXATION 3292-3348 (4th ed. 1924); 4 POMEROY, EQUITY JURISPRUDENCE §§1779-80 (2d ed. 1919).
[20] 240 U.S. 118 (1916).
[21] 259 U.S. 16 (1922).
[22] *Id.* at 557.

ernment "in the course of general jurisdiction over the subject matter in question" and he claimed that it was valid, it was a tax within the meaning of the section, and no injunction would lie. In *Lipke v. Lederer* the complainant denied the application of section 3224 on the ground that the assessment against him was a penalty and not a tax and that therefore the Court should grant him equitable relief.

According to the facts, it appeared that the complainant was arrested on December 29, 1920, for selling liquor contrary to the National Prohibition Act. On March 18, 1921, he received written notice of an assessment against him and of a penalty if he failed to pay within ten days, although he had paid all the internal revenue taxes required by law. Failing to make the demanded payment, he sought an injunction to restrain the collector from seizing and selling his property, alleging that the assessment was an attempt to punish him by fine and penalty for an alleged criminal offense without hearing, information, indictment, or trial by jury, contrary to the federal constitution. The collector answered that section 3224 prohibited the relief prayed for, that the bill stated no ground for equitable relief, and that there was an adequate remedy at law.

The Court, Justice McReynolds delivering the opinion, upheld the contentions of the complainant, holding that a preliminary injunction should have been granted. The reasoning may be briefly stated as follows: The imposition in this case is a penalty. Section 3224 applies to taxes only. Therefore section 3224 does not apply. The following syllogism was implied: A court should grant an injunction to prevent summary enforcement of a penalty. Summary enforcement was attempted in this case. Therefore an injunction should be granted in this case.

In the opinion of the Court the inapplicability of the act was based upon the presumed intention of Congress:

> A revenue officer, without notice, has undertaken to assess a penalty for an alleged criminal act, and threatens to enforce payment by seizure and sale of property without opportunity for a hearing of any kind. . . .
>
> And certainly we cannot conclude, in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded.[23]

It is to be noted that Justice Brandeis, in his dissent, expressed the

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[23] *Id.* at 562.

opinion that the injunction was properly refused because the complainant in his bill had failed to allege any fact which would constitute a basis for equity jurisdiction.

In *Regal Drug Corporation v. Wardell*,[24] decided the same year, the facts were similar to *Lipke v .Lederer*, and the Court merely applied that case. After discussing the distinction there made between a tax and a penalty, and the presumption as to the intent of Congress that section 3224 should not support summary executive action in enforcing penalties for crime, the Court concluded that "the facts impel the application of *Lipke v. Lederer*." Again, the decree of the district court denying a preliminary injunction was reversed.

The reasoning in *Lipke v. Lederer* by which the Court, from basic propositions differentiating a tax from a penalty, proceeded to the conclusion that section 3224 was inapplicable is an example of judicial logic. One might paraphrase the Court as follows: There are two distinct powers of Congress — the power to levy and collect taxes, and the power to enforce penalties for the infractions of its regulatory laws. In the first instance a summary administrative procedure is permissible, and even necessary, in consequence of the paramount importance to the government of its revenues. It is sufficient if Congress grants the aggrieved taxpayer a remedy after he has paid the tax. In the second instance, however, there are greater limitations upon the power of Congress. Constitutional guarantees to the individual forbid a summary administrative procedure in enforcing penalties for crime. Section 3224, which supports a summary administrative procedure, was enacted in support of the taxing power of the government. It is here proposed to apply it to an exaction imposed under the power to Congress to prescribe and enforce penalties from criminal acts. It is not to be presumed that Congress was unmindful of its limitattions in exercising this latter power. Therefore the Court will not, in the absence of express language to the contrary, assume that Congress intended the prohibition of section 3224 to have a broader application than is consistent with a proper interpretation of the powers of Congress.

Thus, the Court's conclusion follows logically from what seems to be the underlying premise, that is, that Congress may prescribe a summary administrative procedure under the taxing power, but not under its power to enforce penalties for crime. It may be questioned, however, whether the facts in this case justify an adoption

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[24] 260 U.S. 386 (1922).

of the above proposition as a major premise. This last "act of faith" is especially difficult. One has a feeling that the Court went out of its way to frown upon summary administrative action in "allegedly" criminal matters. Did the Court misread the operative facts, or was it really a decisive factor that the exactions in question were found to be penalties and not taxes? In this connection it is to be remembered that although section 3224 forbids the courts to maintain a suit to restrain the assessment or collection of taxes, it gives no authority whatsoever for any positive action. Thus when the Court found that there was no restraint upon the judiciary under section 3224 because the tax was a penalty, this fact alone would not authorize the injunction. There had to be other circumstances, of a positive nature authorizing the injunction; without them it was immaterial whether section 3224 applied or not. Apparently the Court thought that the attempt to enforce a penalty by summary proceedings was sufficient ground for the injunction. But Justice Brandeis, in his dissent in *Lipke v. Lederer*, thought that the facts there presented were insufficient to justify the intervention of a court of equity.

Who was right, Justice Brandeis, or the majority? In our opinion their point of difference was the primary question in the case: whether or not the facts presented justified the granting of an injunction. But the Court seems to infer that its main task was to show that section 3224 did not apply. It focused its attention on the question of whether the exaction demanded was a penalty and not a tax — and then linked the two concepts "penalty" and "summary administrative procedure" as if anyone would recognize that the result could only equal "a ground for the equity jurisdiction of the court." Of course, in some circumstances this result will follow, if the inadequacy of the legal remedy is shown. But in the instant case it seems that the Court became so disturbed by the words "penalties for crime" and "the secret findings and summary action of executive officers" that it bent every energy in the direction of protecting the helpless individual from these bogies instead of concentrating on the real question: Do the facts, as presented, actually justify the intervention of a court of equity? However, regardless of the wisdom of the Court's choice of the basic premise in these cases, it is now a settled rule that the prohibition of section 3224 will not apply with respect to so-called taxes which are really penalties.

The logic of such a distinction is to be admitted, for the elaborate justification of summary procedure in the assessment and collection of taxes on the grounds of the importance of revenue to the very existence of the government and the consequent necessity that the procedure by which it is levied and collected should not be inter-

fered with, do not apply to penalties, which are imposed not primarily for revenue but by way of regulation. The theory behind the penalty is entirely different from that of the tax. For a penalty is in the nature of a punishment for those who fail to conform to a prescribed mode of action. The purpose of a regulatory law is to punish only to the extent necessary to secure compliance with its provisions; in its ideal operation no penalties at all would be imposed. Therefore, the Court's insistence on the observance of constitutional guarantees to the individual in the imposition of penalties could not seriously affect the revenue of the government.

One further question may be raised in this connection. If the complainant fails to plead that the exaction against whose assessment or collection he is protesting is a penalty, will the Court of its own accord investigate the nature of the so-called tax? *Bailey v. George,* mentioned above, indicates that it will not. It appears from the reasoning and the argument of counsel, as found in the report of the case, that although the complainant alleged that the act of Congress under which the exaction was imposed was unconstitutional, he did not plead that the exaction was a penalty. The Court definitely held that it could not grant the injunction because of the restraint placed upon it by section 3224. Yet in *Bailey v. Drexel Furniture Co.*,[25] the next case in the reports following *Bailey v. George,* and involving the same Child Labor Tax Law, the Court reached the conclusion that the "tax" was actually a penalty.

Apparently the Court's statement in *Bailey v. George,* declaring that it was restrained by section 3224 (even though by a later decision it appeared that a penalty had been involved) is to be reconciled with *Lipke v. Lederer* and *Regal Drug Co. v. Wardell,* decided later in the same year on the ground of defective pleading in the former case. If the complainant neglects to plead averments sufficient to bring his case within the equity jurisdiction of the court, although such actually exist, that is his own fault. Of course, if he had pleaded that the exaction was a penalty, the final result might not have been different. For the distinction, which was pointed out in *Lipke v. Lederer,* between the existence of facts which take the case out of the prohibition of section 3224 (e.g., that the exaction was a penalty) and of facts which justify the intervention of a court of equity, should be kept in mind. These words of Chief Justice Taft seem to indicate that grounds for equity intervention did not exist:

In spite of their averment, the complainants did not exhaust all

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[25] Child Labor Tax Case, 259 U.S. 20 (1922).

> their legal remedies. They might have paid the amount assessed under protest and then brought suit against the collector to recover the amount paid with interest. No fact is alleged which would prevent them from availing themselves of this form of remedy.[26]

Thus, unless summary assessment and collection of a penalty is a ground for equity intervention, it is of no practical significance in cases such as *Bailey v. George* that the complainant failed to allege the imposition of a penalty and not a tax, although the acceptance by the Court of this allegation would have rendered section 3224 inapplicable under the Court's present interpretation of that statute.

After the passage of the act setting up the Agricultural Adjustment Administration[27] the meaning of "tax" in section 3224 again became a controversial issue.[28] Were the processing taxes imposed under the AAA within the prohibition of section 3224 so that a court of equity could not grant an injunction restraining their assessment or collection? This was apparently one of the points which Congress intended to clarify when it added an amendment to the original act on August 24, 1935,[29] which specifically denied the right to enjoin the processing taxes in language very similar to that of section 3224. The further provision was made that no suit could be maintained to recover any taxes actually paid unless the taxpayer (processor) could show that he had not passed the tax on to the purchaser of the commodity. However, this amendment did not end the conflicting decisions of the lower courts. Some of them granted injunctions on the ground that the remedy provided by the amendment was arbitrary and unreasonable.[30]

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[26] Bailey v. George, 259 U.S. 16, 20 (1922).
[27] Agricultural Adjustment Act, 48 Stat. 31 (1933).
[28] 49 HARV. L. REV. 109 (1935).
[29] 7 U.S.C. § 623 (a) (1935). It provides:
> No suit, action, or proceeding (including probate, administration, receivership, and bankruptcy proceedings) shall be brought or maintained in any court if such suit, action, or proceeding is for the purpose or has the effect (1) of preventing or restraining the assessment or collection of any tax imposed or the amount of any penalty or interest accrued under . . . [this chapter] . . . on or after August 24, 1935, or (2) of obtaining a declaratory judgment under section 400 of Title 28 in connection with any such tax or such amount of any such interest or penalty. In probate, administration, receivership, bankruptcy, or other similar proceedings, the claim of the United States for any such tax or such amount of any such interest or penalty, in the amount assessed by the Commissioner of Internal Revenue, shall be allowed and ordered to be paid, but the right to claim the refund or credit thereof and to maintain such claim pursuant to the applicable provisions of law, including subsection (d) of this section, may be reserved in the court's order.
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> This section became section 21 (a) of the original act.

[30] See cases cited in 49 HARV. L. REV. 109, 113-16 (1935).

The question did not come before the Supreme Court until the case of *Rickert Rice Mills, Inc. v. Fontenot*[31] where a motion was made for a preliminary injunction restraining the collection of the assailed tax. The bill charged that the exaction was unconstitutional, that collection by distraint would cause irreparable injury and that the petitioner had no adequate remedy at law to recover if he paid the tax. The respondent filed a motion to dismiss, citing section 3224, and section 21 (a) of the amended AAA, as prohibiting restraint of collection, and also asserting that the petitioner had a plain, adequate and complete remedy at law.

Without passing upon these points the Court merely entered a short decree granting a preliminary injunction "pending hearing and determination of the causes in the Court," and upon condition that the amount of the tax should be paid over each month to a depository appointed by the Court. Justices Brandeis, Stone and Cardozo registered their dissent, without opinion. In view of the Court's decision in *United States v. Butler*,[32] soon thereafter, in which the processing tax was declared to be "not a true tax," but a mere incident in the regulation of agricultural production — "the expropriation of money from one group for the benefit of another" — the Court could have rejected the application of section 3224 by employing reasoning similar to that in *Lipke v. Lederer*, that is, in granting the preliminary injunction it could have reasoned that section 3224 was a restraint upon the Court only where taxes were concerned, that the processing tax was not a true tax, and that the act would therefore not apply. But it could not so easily have set aside section 21 (a) of the amended AAA which expressly concerned processing taxes and specifically enjoined the granting of an injunction to restrain their collection. Perhaps it was because the Court was aware of this difficulty, but was unwilling to express an opinion as to the validity of section 21 (a) before passing on the AAA as a whole, which accounts for the opinion without reasons in the decree granting the preliminary injunction. At any rate the Court's position is equivocal and does not resolve, in the slightest, the uncertainty evidenced by the lower courts in the injunction cases as to the extent of the limitation which section 3224, and the analogous provision of section 21 (a), placed upon the courts.

The second case of *Rickert Rice Mills, Inc. v. Fontenot*,[33] in which the preliminary injunction was made permanent, was decided after

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[31] 296 U.S. 569 (1935).
[32] 297 U.S. 1 (1936).
[33] 297 U.S. 110 (1936).

United States v. Butler. Since the Court, in the *Butler* case, had declared the AAA to be unconstitutitonal, it could now uphold on this ground the injunction against the collection of the processing tax, and a discussion as to the application of section 3224 was no longer in point. Nor was it necessary to discuss whether the AAA act had provided an adequate remedy at law for processors who first paid and then brought suits for recovery.

Let us now consider the questions: To what extent will the existence of "extraordinary and exceptional circumstances" render section 3224 inapplicable? What constitutes such circumstances? That the existence of extraordinary circumstances would make section 3224 inapplicable was at first only hinted at by the Court, by way of dicta. In *Dodge v. Osborn*[34] Mr. Chief Justice White said, ". . . it is obvious that the statute plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstances its provisions are not applicable." But he made no attempt to explain what, in his opinion, would constitute such circumstances, except in a negative way. He held that the averments that "[U]nless the taxes are enjoined many suits by other persons will be brought for the recovery of the taxes paid by them" and also that "[B]y reason of §3187, Rev. Stat. (Comp. Stat. 1913, §5909), making the tax a lien on plaintiffs' property, the assessment of the tax would constitute a cloud on plaintiff's title" were inadequate to sustain jurisdiction, "since it is apparent on their face they allege no ground for equitable relief independent of the mere complaint that the tax is illegal and unconstitutional and should not be enforced."[35]

A similar reasoning was followed by the Court in *Bailey v. George,* six years later. Chief Justice Taft, delivering the opinion, said, "The averment that a taxing statute is unconstitutional does not take this case out of the section [3224]. There must be some extraordinary and exceptional circumstance not here averred or shown to make the provisions of the section inapplicable."[36] Like Justice White in the earlier case, he did not make any attempt to explain further what he would consider to be "extraordinary and exceptional circumstances." In *Graham v. du Pont*[37] the respondent alleged the existence of "entirely exceptional circumstances," but again, the Court did not find that the facts of the case supported such an allegation. The fact that the complainant had delayed paying the tax against which protest was made until his right to sue to recover had expired was held not to make a

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[34] 240 U.S. 118, 122 (1916).
[35] *Id.* at 121-22.
[36] 259 U.S. 16, 20 (1922).
[37] 262 U.S. 234 (1923).

case "so extraordinary and entirely exceptional as to render section 3224 inapplicable."

The first case in which, in the Court's opinion, the circumstances alleged were so exceptional in nature as to make section 3224 inapplicable was *Hill v. Wallace*.[38] Briefly stated, the facts were as follows: Eight members of the Chicago Board of Trade filed a bill against the Secretary of Agriculture, the District Attorney, the Collector of Internal Revenue and the Chicago Board of Trade in which they attacked the validity of the Grain Future Trading Act which imposed a prohibitive tax on all contracts for sale of grain for future delivery except those made through commodity exchanges designated as contract markets by the Secretary of Agriculture. They sought to enjoin the various officers and the Board of Trade from taking any steps to comply with the act. The bill averred that the appellants had applied to the Board of Trade to institute suit, but it refused because it feared the antagonism of the public officials.

The Court, speaking through Chief Justice Taft, proceeded first to ascertain whether, assuming the act to be invalid, the complainants' bill stated sufficient equitable grounds to justify the granting of the relief sought. After holding that there were sufficient equities as against the Board of Trade the Court undertook to answer the question: Is the suit in violation of section 3224, in so far as it seeks relief against the District Attorney and the Collector of Internal Revenue? The reply of the Court to this question was as follows:

> It has been held by this court, in *Dodge v. Brady*, 240 U.S. 120, 126, that section 3224 of the Revised Statutes does not prevent an injuncton in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. See also *Dodge v. Osborn*, 240 U.S. 118, 122. In the case before us, a sale of grain for future delivery without paying the tax will subject one to heavy criminal penalties. To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back would necessitate a multiplicity of suits and, indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market in order to test the validity of the act would stop its 1600 members in a branch of their business most important to themselves and to the country. We think these exceptional and extraordinary circumstances with respect to the operation of this act make section 3224 inapplicable.[39]

Apparently the Court considered the "extraordinary and entirely exceptional circumstances" in this case to be the untoward conse-

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[38] 259 U.S. 44 (1922).
[39] *Id.* at 62.

quences which would befall the Board members if, in an attempt to test the validity of the Future Trading Act, the Board of Trade refused to comply with its provisions. In such an event if the members sold grain without paying the tax, they would be subject to heavy criminal penalties; if they paid the heavy tax and then sued to recover it back, such a multiplicity of suits would result as would be impracticable, and besides, the trading in grain futures would be brought to a standstill. It may be noted that these onerous circumstances would arise only upon a failure of the Board of Trade to comply with the act, and yet they are considered by the Court as making section 3224 inapplicable. It seems to follow that there is a duty upon the Board of Trade to contest the act's validity in conformance with the desires of the stockholders bringing suit. However, the Court makes the further statement that "the right to sue for an injunction against the taxing officials is not, however, necessary to give us jurisdiction."

This would seem to relegate the remarks as to the inapplicability of section 3224 and the reasons therefor to the category of dicta. Yet in the later case of *Graham v. du Pont*[40] the Court dwelt at length upon *Hill v. Wallace,* cited the dire consequences which would follow an attempt to contest the validity of the Future Trading Act — the heavy criminal penalties to which the individual members would be subjected if they failed to pay the prohibitive tax on each transaction in grain futures, the utter impracticability of paying and then suing to recover the tax — and then concluded as follows:

> Under these extraordinary and most exceptional circumstances, it was held that section 3224 was not applicable to prevent an injunction against collection of such a prohibitive tax imposed for the purpose of regulating the future grain business with all the unnecessary and disastrous consequences its enforcement would entail if the act was unconstitutional.[41]

The Court then made this further remark: "*Hill v. Wallace* should, in fact, be classed with *Lipke v. Lederer* . . . as a penalty in the form of a tax."

This last statement does not seem to agree entirely with the Court's analysis of *Hill v. Wallace* immediately preceding and one wonders just what significance to attach to it. From the examination of *Hill v. Wallace* it appears that if there was a holding as to the inapplicability of section 3224 it was based upon the "extraordinary and exceptional circumstances," named by the Court, which would follow an attempt to test the validity of the Future Trading Act, and not upon any examination of the precise nature of the prohibitive tax in-

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[40] 262 U.S. 234 (1923).
[41] *Id.* at 257-58.

volved. The "tax" may have been a penalty, but the Court did not say so at the time, nor base its reasoning upon that fact. Perhaps the Court later regretted this omission, and sought to remedy it by means of dicta in another case!

Before leaving *Hill v. Wallace*, a further point should be noticed. In the opinion the Court cited *Dodge v. Brady*[42] as a holding "that section 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances, make its provisions inapplicable."[43] An examination of *Dodge v. Brady*, however, fails to disclose such a holding. Apparently Chief Justice Taft was overhasty in his perusal of that case and misunderstood what Chief Justice White was trying to say. There were two bills in *Dodge v. Brady*, only the first of which sought to restrain the collection of a tax, and brought up the question of whether section 3224 forbade an injunction. The lower court held that section 3224 did apply, and the Supreme Court agreed. The supplemental bill sought the recovery of the tax, and it was in connection with this bill that the exceptional circumstances came in — but this had nothing to do with section 3224, for the tax had already been paid. Hence *Dodge v. Brady* is scarcely a precedent for holding that section 3224 is inapplicable under extraordinary circumstances.

By far the most important case with respect to the "extraordinary circumstances" doctrine was that of *Miller v. Standard Nut Margarine Co.*,[44] decided in 1932, where the Court, in a direct holding, declared that such "extraordinary and exceptional circumstances" existed as to render the provisions of section 3224 inapplicable. According to the facts the petitioner, purporting to act under the Oleomargarine Act of 1886, as amended in 1902, sought to collect from the respondent company a tax of ten cents a pound upon its manufactured product. The company asked for an injunction restraining the petitioner, alleging that it would be unable to pay the tax, that to attempt to pay it would involve forfeiture of its entire plant and the destruction of its business, that the exaction was really a penalty, so that section 3224 did not apply, and finally, that it had set up its business relying on certain district court decisions, and letters from government officials to the effect that the oleomargarine tax did not apply to its product which was made from vegetable fats.

The case came to the Supreme Court upon a writ of certiorari. The petitioner sought reversal upon the ground that section 3224 for-

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[42] 240 U.S. 122 (1916).
[43] Hill v. Wallace, 259 U.S. 44, 62 (1922).
[44] 284 U.S. 498 (1932).

bade an injunction against the collection of a tax even if erroneously assessed, and that if there was any exception to its application, this case was not within it.

The Court, speaking through Justice Butler, denied the petitioner's contention that section 3224 applied in this case. The reasoning was as follows: Section 3224 is declaratory of equity principles existing before its enactment and should be construed as near as may be in harmony with them. Two of these principles are: (1) A suit will not lie to restrain the collection of a tax upon the sole ground of its illegality, and (2) in cases where complainants show that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence a suit may be maintained to enjoin the collector. It is therefore not to be presumed that Congress, without specifically saying so, intended for section 3224 to restrain the Court when it would otherwise have equity jurisdiction. For section 3224 has never been held to be absolute, but, on the contrary, the Court has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable. After remarking that "a valid oleomargarine tax could by no legal possibility have been assessed against the respondent," Justice Butler concluded:

> It requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law. It is clear that, by reason of the special and extraordinary facts and circumstances, section 3224 does not apply.[45]

This case definitely lays down the rule "that the existence of special and extraordinary circumstances sufficient to bring the case within some aknowledged head of equity jurisprudence" will make section 3224 inapplicable. The Court infers that in so holding it is following precedent, but, as has already been noted, its comments in previous cases as to the effect of exceptional and extraordinary circumstances were all dicta, with the possible exception of *Hill v. Wallace*.

The opinion in *Miller v. Standard Nut Margarine Co.* is unsatisfactory for a number of reasons. Its reliance on "extraordinary and entirely exceptional circumstances" is to be regretted, for the concept has not a fixed or certain meaning and its use in connection with the interpretation of section 3224 only leads to greater confusion as to the latter's meaning. Moreover, the Court's reasoning that without "specific language" to that effect Congress could not have intended section 3224

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[45] *Id.* at 510-11.

to apply when "extraordinary circumstances" existed appears to be an illustration of a "spurious" interpretation. For the statute is clear in its wording, and in another section Congress had provided a remedy. What, then, was the necessity of reading this limitation into the act? Did the Court mean to say that it could not be presumed that Congress would undertake to limit the equity jurisdiction of the courts? For surely this is what the holding amounts to. In effect the Court says that if special circumstances exist which bring the case within some acknowledged head of equity jurisdiction, section 3224 does not apply, and the Court may issue an injunction. But in the absence of such circumstances the Court will lack equity jurisdiction because there will be no basis for such jurisdiction. To say that section 3224 applies only in such cases seems a little absurd. It is tantamount to saying that sectiton 3224 forbids the courts to issue injunctions only when they would not have authority to issue them anyway! It denies any force whatever to sectiton 3224 except as declaratory of an equitable rule previously followed by the courts.

The Court seemed to attach some significance to the fact that "a valid oleomargarine tax could by no legal possibility have been assessed against the respondent." The inference was that since the tax was undoubtedly illegal the reasons underlying section 3224, that is, the government's right to protect its revenue, "apply, if at all, with little force."

The reasoning of the dissent may be sharply contrasted with that of the majority. Justice Stone's brief opinion may be summed up as follows: Section 3224 denies to the courts jurisdiction to restrain the assessment or collection of any tax. The purpose of the present suit is to enjoin the collection of a tax. Therefore the courts do not have jurisdiction of the present suit. The theory underlying this brief opinion apparently was that the jurisdiction of the courts in such cases was a matter of legislative and not judicial discretion. Certainly, Justice Stone did not share the majority opinion that section 3224 was merely declaratory of equity principles, for he concluded his remarks with this abrupt statement: "Enacted in 1867, this statute, for more than sixty years, has been consistently applied as precluding relief, whatever the equities alleged."[46]

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[46] *Id.* at 511. (Brandeis, J., concurred in the dissent.)

In Allen v. Regents of Univ. System of Georgia, 304 U.S. 439, 445, 449 (1938), Mr. Justice Roberts, delivering the opinion of the Court, said (at 445), "If the tax, the collection of which was threatened, constituted an inadmissible burden upon a governmental activity of the State, the circumstances disclosed render the cause one of equitable cognizance and take it out of the prohibition of R. S. Sec. 3224." The Court then held, "The statute is inapplicable in exceptional cases where there is no plain, adequate, and complete remedy at law. This is such a case, for here the assessment is not of a tax payable by respondent but of a penalty for failure to col-

Another question which has arisen in several cases is the application of section 3224 in a suit by a stockholder against the corporation to restrain it from paying taxes. In *Pollock v. Farmers' Loan & Trust Co.*,[47] Pollock, a stockholder in the corporation, sought to restrain it from voluntarily complying with the provisions of the Income Tax Act of 1894 on the ground that the act was unconstitutional. The government appeared amicus curiae and, apparently wishing to present no bar to the Court's assumption of jurisdiction, so that the matter of the constitutionality of the Income Tax law could be immediately decided, expressly waived the question of jurisdiction so far as it was in its power to do so, and did not raise the objection of adequate remedy at law.

Under these circumstances the Court felt justified in assuming jurisdiction upon the merits. It found section 3224 to be no bar by pointing out that the complainant sought to prevent only the *voluntary* payment of the tax by the corporation. Therefore, the complainant did not seek relief in respect of assessment and collection themselves, which alone was forbidden by section 3224, and the Court would not be justified in declining to proceed to judgment on the merits.

There were four dissenting justices in the *Pollock* case, of whom Justices White and Harlan wrote opinions. Justice White thought that section 3224 forbade the suit, being unable to see any difference between a suit to prevent voluntary payment of a tax, and a suit to restrain its collection. In his opinion the stockholder was attempting to do indirectly what the corporation could not do directly and therefore section 3224 was just as applicable in the one case as in the other. His test as to the application of the section was the ascertainment of "the real object of the suit." Thus, in so far as this was different from the professed object Justice White would confer a large measure of discretion upon the Court. If the Court had followed his reasoning, the application of section 3224 would have been limited only by the inability of the Court to see in any suit "a real object" to prevent collection of taxes imposed by Congress. As

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lect from another."

Mr. Justices Reed and Stone concurred in the results reached in Allen v. Regents of Univ. System of Georgia except on the construction given to Section 3224. They apparently took the position that Section 3224 of the Revised Statutes took away the Court's jurisdiction and that it should be followed by the courts.

Of course deviations from the wording of Section 3224 have resulted in much confusion in the lower courts. Notice the recent case of Enochs v. Williams Packing & Navigation Co., 291 F.2d 402, 408 (1961). The dissenting opinion of Judge Rives there follows the views expressed by Justices Stone and Reed. Judge Rives would also base his conclusion on the fact that exceptions were written into the statute with the passage of the 1939 Internal Revenue Code. He said, "[T]he statute having provided express exceptions to its prohibition, it would seem that implied exceptions are excluded."

[47] 157 U.S. 429 (1895).

summarized by Justice Harlan, "A suit which would defeat the object of the statute is an evasion of its provisions."

Twenty-one years after the *Pollock* case the Court handed down its opinion in *Brushaber v. Union Pacific R.R. Co.*[48] which was also a stockholder's suit to enjoin the corporation from paying an income tax. The government, instead of waiving any objection to the Court's jurisdiction, specifically argued that section 3224 precluded the remedy sought. Chief Justice White, now speaking for the majority, denied the government's contention and held that the lower court had jurisdiction. How did he arrive at this conclusion in the light of his dissent in the *Pollock* case? The reasons he assigned for his holding were 1) the equitable grounds alleged in the stockholder's bill, among which was the averment that there was an absence of all means of redress if the corporation voluntarily paid the tax, and (2) the "ruling" in the *Pollock* case to the effect that to sustain "the right of a stockholder to sue to restrain a corporation under proper averments from voluntarily paying a tax" did not violate the prohibitions of section 3224.

From this holding it is clear that Chief Justice White withdrew from his previous position and accepted the majority view in the *Pollock* case as a precedent which should be sustained by the Court. A stockholder may sue (under proper averments) to prevent a corporation from voluntarily paying a tax. One may note, however, that the Court did not say that a stockholder might restrain the corporation from any payment of a tax, but only from a "voluntary" payment on its part. This implies that the corporation is still liable to an action of forcible collection by the government against which, because of the prohibition of section 3224, the stockholder will have no right to interfere.

But will section 3224 absolutely apply in this latter case? If *Miller v. Standard Nut Margarine Co.* is taken as a precedent the answer would seem to be no. If such special and extraordinary circumstances are alleged as to bring the case within some recognized head of equity jurisdiction, apparently the Court could assume jurisdiction even when the stockholder sought to prevent forcible payment by the corporation. But *Corbus v. Alaska Treadwell Gold Mining Co.*[49] indicates the difficulties which confront a stockholder who seeks to invoke equity jurisdiction,[50] so that this is not such a serious limitation upon the application of section 3224 as might be supposed. In that case it was held that a stockholder could not enjoin the corporation from

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[48] 240 U.S. 1 (1916).
[49] 187 U.S. 455 (1903).
[50] Comment, 45 YALE L. J. 649 (1936).

paying the tax unless he showed irreparable injury to the corporation as well as to himself, and also that he had taken every essential preliminary step to justify his claim of a right to act in behalf of such tax debtor. Collusion between the stockholder and the corporation was found in the *Corbus* case, and the injunction was therefore denied. Justice Brewer indirectly referred to section 3224 by saying that Congress had attempted to enforce the equity rule to the effect that equity will not restrain a tax on the ground that it is illegal and therefore that "before a court of equity will in any way help a party to thwart this intent of Congress, it should affirmatively and clearly appear that there is an absolute necessity for its interference in order to prevent irreparable injury."[51]

One wonders if Justice Brewer used the word "thwart" advisedly in the above quotation. If so, this is the nearest the Court comes to expressing a view that in granting injunctions to restrain the collection of a tax, even when justified on equitable grounds, it is nevertheless acting contrary to the intent of Congress that the taxpayer should first pay the tax, regardless of the circumstances of the case, and then pursue the remedy which Congress had provided for a settlement of the conflicting issues involved.

One more case, *Phillips v. Commissioner*,[52] will be considered even though the statutory provision directly at issue was not section 3224, but section 280 (a) (1) of the Revenue Act of 1926.[53] The relation of this provision to section 3224 was such, however, that Justice Brandeis felt it necessary to discuss the latter statute in order to show, by analogy, that the former was constitutional, and not a violation of the individual's rights.

The facts of the case were as follows: A Pennsylvania corporation was dissolved and its assets distributed among its stockholders, one of whom was Phillips who had owned one-fourth of the company's stock. Later, a deficiency assessment for income and profit taxes was levied against the dissolved corporation. Section 280 (a) (1) of the Revenue Act provided that stockholders who had received the assets of a dissolved corporation might be compelled to discharge unpaid corporate taxes, and that the transferee was liable in the same man-

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[51] 187 U.S. 455, 464 (1903).

[52] 283 U.S. 589 (1931).

[53] Section 280 (a) (1) of the Revenue Act of 1926 provides:

"The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax . . . imposed . . . any prior income, excess profits, or war profits tax Act shall be assessed, collected, and paid in the same manner . . . as . . . a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds.)" 44 Stat. 61, cited 283 U.S. 589, 593, n. 3 (1931).

ner as any delinquent taxpayer. Acting under this section the Commissioner of Internal Revenue sent notice to Phillips that he intended to assess against and collect from him the unpaid balance of the taxes (almost the whole amount). Phillips' executors petitioned the Board of Appeals for a redistribution, but the Board held that the estate was liable for the full amount. After affirmance by the Circuit Court of Appeals, the case came to the Supreme Court on a writ of certiorari.

The question here involved was whether section 280 (a) (1) was constitutional, that is, could taxes levied against the dissolved corporation be enforced against a transferee by the same summary administrative procedure as would have been authorized against the corporation itself. The contention mainly urged was that the summary procedure as applied to a transferee was unconstitutional "because it does not provide for a judicial determination of the transferee's liability at the outset." It was said that the administrative determination by the commissioner in the first instance offended against the principle of separation of powers; also that the inherent denial of due process was not saved by provisions for deferred review in the courts.

Justice Brandeis, speaking for the Court, upheld the constitutionality of the contested statute by examining the basis upon which it rested and by refuting the arguments against it. He analyzed the statute as one which provided a new remedy for the government in enforcing tax obligations in proceedings to collect the revenue. Its purpose, therefore, was to make the tax-collecting system more effective, and the means adopted was that of summary administrative procedure. Obviously, the purpose was legitimate, so that the only question necessary to consider was the constitutionality and appropriateness of the means. Justice Brandeis apparently had no difficulty in finding an answer to this question. "The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled," he said, "if the exaction is made under color of their offices by revenue officers charged with the general authority to assess and collect the revenue," and "if adequate opportunity is afforded for a later judicial determination of the legal rights,"[54] summary proceedings to enforce collection may be sustained. Justice Brandeis answered the contention that summary proceedings to collect the tax in the instant case would deprive Phillips of his property without due process of law. He distinguished life and liberty in the due process clause from property, asserting that property rights must yield provisionally to governmental need, and that with respect to property

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[54] 283 U.S. 589, 596-97 (1931).

rights in tax cases the mere postponement of judicial inquiry was not a denial of due process.

Thus, by Justice Brandeis' analysis, the basic propositions upon which a solution of the question in this case depended were exactly the same as those applicable in cases involving an interpretation of section 3224. The decision was based upon the proposition which had been established or accepted with respect to the government's power to collect its revenue, particularly with respect to its power to adopt a summary administrative procedure to enforce collection. The theory set forth in earlier cases was repeated, in substantially the same language, with an outline of the limits beyond which the government might not go. The fact that in earlier cases the summary procedure had been employed to enforce collection against the person directly assessed, while here it was employed to enforce the liability of a transferee for unpaid corporate taxes was an unimportant distinction, according to Justice Brandeis' analysis. Thus, the instant case did not present a new element, but could be decided by applying the propositions already established with respect to the government's power to adopt a summary procedure in collecting its taxes, and the limitations upon that power.

From this study of the cases it is clear that, in the matter of entertaining suits to restrain the assessment or collection of a tax, the courts have long recognized the necessity of a minimum of judicial interference because of the importance of taxes to the "very existence of the government," and that even before the enactment of section 3224 they applied the equity rule which forbade the intervention of the courts when the sole complaint was that of alleged illegality, unconstitutionality, injustice, or irregularity of the tax.

But when Congress, in 1867, enacted the statute forbidding the courts to maintain any suit for the purpose of restraining the assessment or collection of any tax, was it the intention of that body merely to put into statutory form an equitable principle already followed in practice, or did Congress intend, by this act, to place a further limitation upon the equity jurisdiction of the courts? We have examined the decisions involving an interpretation of the act in an endeavor to find the Court's answer to this question, but until the *Miller* case there was no direct holding on the point and even then Justice Stone expressed an emphatic dissent. As has been noted, he was of the opinion that the act definitely limited the equity jurisdiction of the courts.

It must be conceded that Justice Stone had some justification for his position. In the first place he is supported by the wording of the statute, which, in plain terms, purports to limit the courts, under the circumstances specified, and contains no phrases of exception or inapplicability. Secondly, it would seem that "the presumed

intent of Congress" argument, used at various times by the Court to justify exceptions to the application of section 3224, is even more forceful as an argument against such exceptions. For why should it be presumed that Congress did not intend to limit the jurisdiction of the courts, but intended only to express the equity rule, when the plain import of the words is a limitation of jurisdiction and the other interpretation deprives the act of any significance? As we pointed out in discussing the *Corbus* case, there is some indication that Justice Brewer inclined to Justice Stone's view of the Congressional intent, for he spoke of the caution which the Court should exercise before it would in any way "help a party to thwart the intent of Congress." Obviously if this intent was merely to state the rule of equity, it could not be "thwarted" by any court sitting as an equity court.

As a final argument in support of his position, Justice Stone remarked that, since the enactment of section 3224, the Court has always applied the act in spite of the equities alleged. Strictly speaking, this was true, for *Miller v. Standard Nut Margarine Co.* was the first case in which the Court directly held that the statute was inapplicable when there existed special facts and circumstances sufficient to constitute a basis for equity jurisdiction. But Justice Stone ignored the dicta in many of the preceding cases, particularly in *Hill v. Wallace*, which seemed to foreshadow the decision in the *Miller* case.

Regardless of the logic of Justice Stone's position one cannot deny that the majority, speaking through Justice Butler had, if not the weight of precedent, at least the weight of dicta, on their side. In fact, there was no precedent, except in a negative sense. But there was dicta, ranging from the hint, in the early cases, that the existence of special circumstances would render section 3224 inapplicable, to the elaborate pronouncement in *Hill v. Wallace* that there were such "exceptional and extraordinary circumstances with respect to the operation of this act" as to make the statute inapplicable.

Where was the line to be drawn between circumstances in which section 3224 would restrain the courts and "special" circumstances where it would not? It is doubtful whether the Court itself was agreed on an answer to this question until the *Miller* case. Yet it may be that in posing "special circumstances" as an exception to the application of the statute the Court was influenced, consciously or otherwise, by the equity rule existing before the enactment of that act, permitting an equity court to assume jurisdiction in tax cases under certain circumstances. Thus, equity would intervene when (1) the enforcement of the tax would lead to a multiplicity of suits; (2) produce irreparable injury; (3) if the property concerned was real estate, when the assessment or collection would place a cloud

upon the complainant's title; or (4) when there was allegation of fraud. Apparently, since the *Miller* case, these are the "special circumstances" making section 3224 inapplicable. But even under this interpretation, there is much uncertainty as to the application of the statute, for the Court often finds it difficult to determine whether the facts justify equitable intervention. Likewise, the Court often finds itself at variance as to determine whether there is a plain and adequate remedy at law. Consequently, the decision in the *Miller* case by no means dispels that general confusion and uncertaintly as to when section 3224 applies.

The limitation upon the application of the statute, imposed in the *Miller* case, is much more far-reaching and fundamental than in *Lipke v. Lederer.* In the *Lipke* case the Court limited the statute by a precise definition of its terms. Proceeding from the "concept" point of view it examined the facts bearing upon the nature of the exaction whose collection was demanded, compared them with the previously evolved concept of "penalty", found a coincidence, and concluded that propositions having to do with taxes did not therefore apply.

But in the *Miller* case the Court limited the application of the statute by reading into its provisions the exceptions and limitations of previously existing equitable rules and principles. Before this case there seemed to be some justification for the view that section 3224 placed a restraint upon the equity jurisdiction of the courts, although it was by no means clear just how great the restraint was. But the identification of the statute with previously existing equitable principles, in the *Miller* case, took away whatever force it might have had as an independent limitation and, as now interpreted, the act does not place a greater limitation upon the jurisdiction of the courts than existed before its enactment.

PROOF OF INTENT IN SHORT DESERTION

ALFRED AVINS*

INTRODUCTION

Article 85(a)(2) of the Uniform Code of Military Justice punishes as a deserter anyone who quits his organization or place of duty with intent to avoid hazardous duty or shirk important service. The crime is capital in time of war, and indeed the only serviceman executed during World War II for a purely military offense was shot by firing squad for this crime.[1] Hence the offense is of considerable importance, and the manner in which so capital a military crime is to be proven is worth careful examination.

The earliest standard for proving the offense is found in the 1921 Manual for Courts-Martial, which states that it should appear that at the time accused went AWOL either he or his unit was under orders or anticipated orders for duty and that accused's "absence without leave was so timed as to appear calculated to enable him to avoid such hazardous duty or to shirk important service, as the case may be."[2] The present manual is equally cryptic and incomplete. After noting that the proof should show that accused "knew with reasonable certainty" that he would have to perform the duty in question, the Manual suggests three ways of showing this: that accused was informed of the imminence of the duty, that he was present when his unit was so informed, or that accused was away for so long that he must have had reasonable cause to know that he would miss the duty in question.[3]

It is obvious that the above discussion can hardly be considered definitive or all-inclusive. Indeed, in all probability, it omits more situations than it covers. At best, the present Manual presents only fragmentary suggestions; at worst it is absolutely silent. This cannot be deemed to be an adequate yardstick for testing the legal significance of various factors in proving short desertion.

This article will explore the factors considered, and which should be considered, in the proof of the intent to avoid hazardous duty or shirk important service. In so doing, it will seek to clarify the various relevant cases and to point up some of the inadequacies of the present manual's standards.

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* See Contributors' Section, p. 263, for biographical data.

[1] Slovik, 15 E.T.O. 151 (1945).

[2] MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶409 at 344.

[3] MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶164a at 314-15.

STATEMENTS BY ACCUSED

It is often said that intent can only be proved by circumstances.[4] Of course, in general a person's state of mind cannot otherwise be demonstrated, but from time to time direct evidence of intent may be gathered from the accused's declarations. In such a situation, circumstantial evidence of intent is unnecessary.

The clearest proof of intent exists when the accused admits it in court.[5] Thus, there is no problem of proof when the accused confesses he went absent to avoid combat,[6] admits dislike of or inability to endure fighting,[7] expresses "his extreme disgruntlement with his status as a member of a combat unit,"[8] states that he went absent to avoid being in the infantry,[9] or confesses that his departure was due to fright at potential hazards.[10]

In addition to such complete confessions of intent, there are a number of expressions which have been held to constitute significant admissions and to form direct evidence of the requisite intent. Many of these statements will recur repeatedly in similar short desertion cases. Because of their frequent repetition, they constitute a very incriminating item of evidence, and therefore are listed below, as follows:

(1) The accused said that he was "scared,"[11] or that he "was scared and yellow but [he] kept thinking more and more about getting away from it,"[12] or that he was "just yellow,"[13] or was in "mortal terror,"[14] or that "while in Ukrange we were subjected to heavy enemy fire and I was very scared, my nerves went to pieces and I left."[15]

(2) The accused stated he "couldn't take it,"[16] or "couldn't take it any more or longer,"[17] or "couldn't face it,"[18] or "cannot stand it up

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[4] Rose, 43 B.R. 377, 378 (1944).
[5] Silberschmidt, 9 E.T.O. 295 (1944).
[6] Bronson, 33 E.T.O. 91 (1945); Hart, 27 E.T.O. 355 (1945); Allen, 27 E.T.O. 93 (1945). See also Slovik, 15 E.T.O. 151 (1945); Fendorak, 15 E.T.O. 185 (1945).
[7] Ryan, 34 E.T.O. 297 (1946); Davis, 32 E.T.O. 25 (1945); Sabella, 31 E.T.O. 33 (1945); Mabry, 2 N.A.T.O.-M.T.O. 277 (1943).
[8] Englese, 28 E.T.O. 173, 175 (1945).
[9] Uyechi, 45 B.R. 233, 235 (1945); Tolbert, 4 N.A.T.O.-M.T.O. 217 (1944).
[10] Fiorentino, 19 E.T.O. 31 (1945); Yochum, 19 E.T.O. 35 (1945).
[11] Fisher, 30 E.T.O. 199 (1945); Fors, 29 E.T.O. 309 (1945); Sabatino, 24 E.T.O. 51 (1945); Kramer, 18 E.T.O. 285 (1945); Alexander, 16 E.T.O. 1 (1945); Carroll, 14 E.T.O. 185 (1945); Roth, 10 E.T.O. 103 (1944).
[12] Vincent, 18 E.T.O. 243 (1945).
[13] Mangiapane, 22 E.T.O. 235, 237 (1945).
[14] Magnanti, 18 E.T.O. 15 (1945).
[15] Stalte, 17 E.T.O. 231 (1945).
[16] Zottoli, 28 E.T.O. 177, 181 (1945); Straub, 20 E.T.O. 1 (1945); Alexander, 16 E.T.O. 1 (1945); Pugliano, 14 E.T.O. 145 (1945).
[17] Burtis, 19 E.T.O. 1 (1945); ("it is all right at first but then I started getting too much"); Box, 17 E.T.O. 115 (1945); Marchetti, 16 E.T.O. 111 (1945).
[18] Fors, 29 E.T.O. 309 (1945).

there,"[19] or "couldn't take any more combat,"[20] or similar expressions.[21]

(3) The accused "was afraid to move up,"[22] or stated his "fear of being in that company was so great I went AWOL,"[23] or "I haven't got the guts and I can't go,"[24] or "I was afraid they would send me back to the lines and I just can't take that stuff any more."[25]

(4) The accused said "I wanted to live,"[26] or "this is no place for me,"[27] or "it is murder up there,"[28] or he "would rather go to the stockade than to the lines,"[29] or "if the shells ever start to come over, he wouldn't be around."[30]

(5) The accused declared that "the front line doesn't appeal to me,"[31] or that he was "tired of fighting and fed up on combat,"[32] or that "I wanted a rest from soldiering,"[33] or that "he did not intend to sweat out this war by facing Jerry bullets,"[34] or similar thoughts.[35]

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[19] Slonaker, 17 E.T.O. 281 (1945) ("couldn't stand front line duty" and "didn't want to go back"); Robertson, 15 E.T.O. 195 (1945) ("can't stand artillery fire"); Bender, 14 E.T.O. 309 (1945); Pemberton, 14 E.T.O. 283 (1945).

[20] Hadala, 28 E.T.O. 31 (1945) Piantedosi, 14 E.T.O. 287 (1945); ("I couldn't take the shell fire"); Killen, 14 E.T.O. 297, 299 (1944) ("I left because I couldn't take the shelling any more. I do not believe I could go up and take it again").

[21] United States v. Young, 3 C.M.R. 313 (1952) ("I just can't take these patrols"); Ferrara, 31 E.T.O. 219 (1945) (accused had been "up in the line for about three months and had gotten pretty shaky and reached the point where he couldn't take it any more"); Kollman, 19 E.T.O. 205 (1945) (accused "was too frightened to move out with them. I couldn't go on and face the shells, so I remained behind"); Johnson, 4 N.A.T.O.-M.T.O. 399 (1944) ("I left my organization because I did not think I could stand it to go back to the front lines").

[22] Souza, 16 E.T.O. 361 (1945); Schiavone, 23 E.T.O. 263 (1945) ("quite afraid").

[23] Cramer, M.O.-J.A.G.A. 122 (1950).

[24] Philbrook, 4 N.A.T.O.-M.T.O. 221 (1944).

[25] Morris, 19 E.T.O. 189 (1945). See also Hopkins, 32 E.T.O. 387 (1945) ("nervous"); Scheier, 21 E.T.O. 245 (1945) (accused "started hearing the 240 mm artillery going off and I started getting nervous and I wanted to get away from it all").

[26] Weeks, 26 E.T.O. 393 (1945); Torgerson, 17 E.T.O. 81 (1945) (accused "didn't think very much of that after being up there and pulled back knocked-out tanks and seen guys in them after they had been hit"); St. Dennis, 19 E.T.O. 77 (1945) ("I have seen plenty of boys torn up and I did not want to get it").

[27] Brattesani, 24 E.T.O. 375 (1945).

[28] Reed, 17 E.T.O. 213 (1945).

[29] Ford, 14 E.T.O. 249 (1945); Mackey, 28 E.T.O. 231 (1945) (accused said he would rather be court-martialed than killed).

[30] Martin, 23 E.T.O. 117 (1945); Urban, 12 E.T.O. 1 (1944) ("I will see you in a couple of weeks in the guardhouse, maybe. I am taking a vacation").

[31] Lawson, 14 E.T.O. 303 (1945); Rodriguez, 16 E.T.O. 211 (1945) ("I didn't want to go back to the lines").

[32] Cross, 26 E.T.O. 55 (1945).

[33] Giombetti, 17 E.T.O. 345 (1945); Urban, 12 E.T.O. 1 (1944) ("I just don't want to fly any more, and I never did like to fly, anyway"); Pettapiece, 4 E.T.O. 289 (1944) (accused told his commander "that he would not make another amphibious landing and that he thought he had done his part in the war and deserved a break").

[34] Pergolizzi, 24 E.T.O. 65 (1945).

[35] Barker, 17 E.T.O. 331 (1945) ("I got to thinking of the artillery up there and decided not to go back"); United States v. Sutton, 3 C.M.R. 162 (1952) ("if I couldn't drive for the 2d Division, why fight for them").

The above expressions of intent are, of course, of exceptional importance because they express in a direct way the reason behind accused's unauthorized absence. While they are all germane to a combat situation, other declarations which expose accused's motives in going absent would be equally relevant and persuasive in determining whether accused had the requisite intent. Thus, if an accused, who was assigned to an important duty to be carried on at a lonely spot, expressed a distaste for loneliness prior to an unauthorized absence, such a declaration would constitute strong evidence of intent to avoid the important service, since accused's state of mind would shed light on his intent.[36]

Nor need the declaration come before the AWOL. In one case accused went AWOL from a unit engaged in combat; while away he met wounded men from his company, and when told of the heavy casualties the unit had sustained in combat, he said: "Maybe it was a good thing I wasn't there." It was held that such evidence was indicative of his intent at the time he initially went absent.[37] Likewise, in another case, where accused was absent without leave from an organization in an active combat zone during a German offensive and when apprehended stated that there were "not enough men in the Army to take him back to the front lines," the board of review declared: "Accused's statements . . . when confronted with return to combat of his intent not to serve in action again, was some evidence from which reasonable inferences may be drawn as to the state of his mind 19 days before."[38]

In addition to the highly probative statements of intent, motive, or feeling outlined above, several cases have dealt with statements by accused which are further removed in the inferential chain of reasoning from the requisite intent and yet found them to be relevant to the issue. In one, accused was in a replacement battalion area being shipped back to his own unit in combat. The day of shipment he went AWOL, and returned the next day after the shipment had left. It was held relevant that he had been seen among a group of men discussing ways of "beating a shipment."[39] In a similar case, it was held probative of intent to avoid shipment into combat that accused told the court that he had missed two prior shipments and that others also had missed shipments and had not been punished for it.[40] And in a third case, accused's statement that "I waited until news of a successful landing in Sicily reached me before I turned in to the

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[36] LARKIN AND MUNSTER, MILITARY EVIDENCE, §5.43 at 111-18 (1959).
[37] Pizzitola, 3 A.-P. 11, 15 (1945).
[38] Jusiak, 21 E.T.O. 119, 123 (1945).
[39] Donofrio, 3 N.A.T.O.-M.T.O. 73 (1944).
[40] Donohue, 3 N.A.T.O.-M.T.O. 151 (1944).

military police" was properly held to show an intent to avoid hazardous duty because it could be expected that the initial invasion would be especially dangerous.[41]

In all of the above cases, the chain of inference is from the statement to the fact that the accused desired to avoid combat, to the fact that this was his purpose and intent in going AWOL, to the legal conclusion that accused was a deserter. In *United States v. Manashian*,[42] however, the inferential chain was completely reversed. In that case, accused, stationed at Fort Dix, New Jersey, went AWOL to his home in Chicago, intending, after a short absence, to turn himself in there so that he parents could see him. He testified that while units were being moved overseas from Fort Dix, he did not expect his own organization to go. After a short absence, he surrendered in uniform in Chicago. He was "upset" and crying, and said: "Here I am, and shoot me if you want." He testified that his emotional state existed because "most naturally I was scared, and I thought, wartime desertion, I would be shot." Accused's father stated that he "forced" accused to surrender.

The board of review, in upholding the conviction for short desertion, reasoned that accused's statement that he would be shot was a tacit admission that he believed he was a deserter. From this the board reasoned that accused so believed because he knew that his intent in going AWOL was to avoid embarkation, and hence the court was justified in inferring that accused in fact had such an intention. Accordingly, this evidence rebutted accused's denial of intent to avoid embarkation, and accused's conviction was upheld.

Where statements made by the accused show his intent, such statements will be sufficient evidence thereof even though the usual circumstances showing such intent are absent. This fact was clearly pointed out in *United States v. Uyechi*,[43] where the board of review, in commenting upon the insufficiency of the circumstantial evidence to support an inference of intent to desert, declared:

> In the present case, however, we are *not* faced with the problem of *inferring* intent inasmuch as there is direct evidence in the record as to accused's intent. Accused stated that he absented himself because he did not like the infantry; that he was willing to go overseas in some other branch of the service but not as an infantryman. It is evident from this that accused did not intend to go overseas as an infantryman and that he absented himself to avoid overseas shipment as an infantryman. Thus, there is direct proof that when he absented himself without leave he did so with the intent

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[41] Mabry, 2 N.A.T.O.-M.T.O. 277 (1943).
[42] Manashian, 13 B.R. 363 (1942).
[43] Uyechi, 45 B.R. 233 (1945).

to avoid overseas shipment as an infantryman, and it becomes unnecessary in this case to draw any inference as to accused's intent: he has admitted what his intent was.[44]

ABSENCE TO AVOID COMBAT

Probably one of the most common types of short desertion is absence without leave to avoid engaging in combat. Because of the frequency of this offense, there have been numerous cases thereof reported, and the criteria for proving AWOL to avoid combat through circumstantial evidence have gradually become crystallized. They are, in addition to proof of the absence, (1) that accused or his organization was under orders or anticipated orders involving hazardous duty, namely, combat with hostile forces; (2) that the accused was aware of this anticipated duty; and (3) that at the time he went absent, or during his absence, he entertained the specific intent to avoid the duty.[45]

In reality, the last-named requirement is the ultimate conclusion, and is not an independent element to be proved at all, for the cases uniformly hold that the court-martial may infer the presence of the intent if the other elements are shown and no other reasonable explanation appears.[46] Thus, one board of review declared after these first two elements were shown:

> On these facts, a strong presumption of guilt was created. The burden of going forward with the evidence shifted and found all of accused silent. From these facts, unexplained, the court was justified in inferring that the absence without leave of accused was accompanied by the intention . . . to avoid hazardous duty, or to shirk important service.[47]

The typical so-called "battle-line desertion" finds the accused going absent without leave from a unit actually engaged in combat[48] or moving into a combat situation.[49] In such cases, there is little prob-

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[44] *Id.*, at 237.
[45] Reid, 33 E.T.O. 87 (1945).
[46] *Ibid.*
[47] Nichols, 29 E.T.O. 67 (1945).
[48] United States v. Squirrel, 2 U.S.C.M.A. 146, 7 C.M.R. 22 (1953); Dolberry, 34 E.T.O. 181 (1946); Pack, 6 N.A.T.O.-M.T.O. 13 (1945); Pleban, 4 N.A.T.O.-M.T.O. 355 (1944); Robinson, 4 N.A.T.O.-M.T.O. 297 (1944); McCullough, 2 N.A.T.O.-M.T.O. 175 (1943); Barbieri, 1 N.A.T.O.-M.T.O. 293 (1943); McCann, 1 N.A.T.O.-M.T.O. 129 (1943); Hahn, 2 C.B.I.-I.B.T. 165 (1944); Schryver, 2 C.B.I.-I.B.T. 159 (1944). See Milner, 17 E.T.O. 119 (1945) (AWOL from unit in battle suffering 85% casualties).
[49] Whitehead, 29 E.T.O. 33 (1945); Mastropieta, 22 E.T.O. 67 (1945); Torgerson, 17 E.T.O. 81 (1945); Brothers, 12 E.T.O. 397 (1944); Bellville, 5 N.A.T.O.-M.T.O. 249 (1945); Crismond, 5 N.A.T.O.-M.T.O. 223 (1944); Lemaster, 5 N.A.T.O.-M.T.O. 93 (1944); Funaro, 5 N.A.T.O.-M.T.O. 87 (1944); Mauriquez, 5 N.A.T.O.-M.T.O. 81 (1944); Coffey, 4 N.A.T.O.-M.T.O. 379 (1944); Dorsey, 4 N.A.T.O.-M.T.O. 371 (1944); Williams, 4 N.A.T.O.-M.T.O. 287 (1944); Cafazzo,

lem of finding the above elements sufficient to support the necessary inference. As a board of review noted in one typical case:

> Accused absented himself without authority . . . while his company was "dug in" in the front lines or near thereto in the Hurtgen Forest. Enemy shell fire was passing overhead. Reinforcements were being received in the company and preparations were being made for an attack against the enemy. It is a well-known historical fact of which the court could take judicial notice that the battle of the Hurtgen Forest was one of the most vicious, bloody and hard-fought of the campaign of northern Europe.[50]

In the typical "battle-line desertion" case, the accused goes absent without leave just before the hazardous duty is to commence and returns after it is over. This timing has been held to be of much significance. One board of review declared:

> It is no mere coincidence but a highly incriminating fact that accused's absence commenced immediately prior to this important action and terminated after the conclusion of the conflict. By his timely and conveniently arranged absence he avoided the hazards and perils of battle endured by his fellow soldiers.[51]

The two most important issues in determining whether circumstantial evidence will support an inference of intent to shirk combat duties are, first, whether the duty ordered was imminent, and, secondly, whether accused knew that the duty was imminent. This requirement of hazardous duty at an early date is fundamental in proving the requisite intent.

The reason why failure to show that the accused's unit was engaging in or very shortly anticipating hazardous duty at the time of

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4 N.A.T.O.-M.T.O. 207 (1944); Silva, 4 N.A.T.O.-M.T.O. 183 (1944); Himes, 4 N.A.T.O.-M.T.O. 43 (1944); Disher, 4 N.A.T.O.-M.T.O. 23 (1944); Grabowski, 3 N.A.T.O.-M.T.O. 383 (1944); Jamruska, 3 N.A.T.O.-M.T.O. 363 (1944); Weissinger, 3 N.A.T.O.-M.T.O. 339 (1944); Crance, 3 N.A.T.O.-M.T.O. 37 (1944); Jacobsen, 2 A.-P. 383 (1945).

[50] Davis, 27 E.T.O. 309, 310-11 (1945). See also Guest, 3 N.A.T.O.-M.T.O. 61, 63 (1944), where the board declared:

> The duty of the organization was to keep the enemy from coming into Tebessa, and it was subject to attack and actual combat with the enemy at any time. Under these circumstances the court was warranted in concluding that accused absented himself with the specific intent of avoiding the hazardous duty of engaging in combat with the enemy.

[51] Love, 12 E.T.O. 167, 168 (1945). And note Box, 17 E.T.O. 115, 117 (1945):

> Accused was a member of an emergency detachment which had been dispatched on a mission of great importance. In company with the men of his unit he marched to the front, engaged the enemy and encountered their shellfire. At the crucial moment when his organization was under attack and his services most needed, he left his command and did not return until the enemy action was concluded. . . . The only credible inference which can be drawn . . . is that he understood that his presence at his post of duty involved tremendous risks of his life and that he deliberately absented himself to avoid these battle hazards.

accused's absence is fatal to proof of the necessary intent in the ordinary case,[52] is that unless an inference can be drawn from the propitious timing of the AWOL the mere fact of absence alone lacks probative value. There may be any one of a number of reasons why an accused would go AWOL, even from a combat unit, besides intent to avoid battle hazards, and unless all absences therefrom are automatically equated to desertion,[53] no inference of intent can be drawn from absence without more. It is only when the timing of the absence is such that it comes at just the right moment to enable accused to avoid the duty that it may be inferred that this convenient timing was not a coincidence, but that the absence was planned to occur at this time, and that the reason for such careful planning as to the time of the absence was a purpose to avoid the duty involved.[54]

A leading case illustrating the necessity for showing imminence of duty is *United States v. Perry*.[55] There, the accused were members of a tank destroyer unit which landed in France after the allied invasion and moved into a rest area where it reorganized, repaired, and cleaned its equipment and awaited the arrival of the rest of the division. The unit remained awaiting orders to move up to the front and to engage in another drive, and the board of review found that "it may reasonably be inferred from this evidence that the unit was under anticipated orders involving active combat duty against the enemy."

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[52] Rogers, 17 E.T.O. 274 (1945).

[53] Leone, 30 E.T.O. 257, 259-60 (1945):

> Accused absented themselves from a rest area where their company had been for four or five days undergoing training and "preparation for a move upon completion of our assignment." The record contains not the slightest evidence of when or where the company was to move or did move—to say nothing of accused's knowledge thereof. Training of a combat unit imports ultimate combat, but is not proof of its imminency and is insufficient alone to support an inference of an intent to avoid hazardous duty; otherwise, all absences without leave from combat units would support findings of an intent to avoid hazardous duty. Though accused absented themselves from a rest area which was some three miles from the front lines, [it] . . . was not . . . being subjected to shelling, occasional or otherwise. The Board of Review is of the opinion that the court could not properly infer from the circumstances shown that either accused was aware of the existence of imminence of hazardous duty and absented himself to avoid such duty.

[54] Note MANUAL FOR COURTS-MARTIAL, U.S., 1921, ¶409 at 344: "that his absence without leave was so timed as to appear calculated to enable him to avoid such hazardous duty or to shirk such important service." See also Petruso, 13 E.T.O. 235, 237 (1945):

> The evidence presents a perfect pattern of the offense of absence without leave with intent to avoid hazardous duty. The accused suffered superficial minor wounds which were pronounced non-disabling. He legitimately appeared at the aid station for treatment. With full knowledge that his unit was engaged in an attack on the enemy, he availed himself of the opportunity thus afforded him to avoid further hazards of battle. For three days he remained in comparative safety while his fellow soldiers faced the greatest of battle dangers. When the attack was over he conveniently returned to his command.

[55] Perry, 16 E.T.O. 61 (1945).

However, the board found that no one knew where or when the duty would commence, and that all that was known was that it would begin "some time or other." Indeed, at the time accused went AWOL, men were permitted to absent themselves from the area for the purpose of visiting friends in neighboring units. Accordingly, it was held that there was no evidence on which an inference of intent to avoid hazardous duty could be based. The board declared:

> [The prosecution] failed to prove that such duty was imminent at the time accused departed without authority. . . . It is clear that proof or inference of accused's knowledge that their unit would *eventually* move forward in hazardous operations is insufficient. . . . [In prior] cases the units of the accused involved were actually engaged in combat or in highly important tactical missions either at or shortly after the commencement of his unauthorized absence. . . . [This case differs because] there is no evidence as to how long after accuseds' departure, Company A came into contact with the enemy. Evidence that their unit landed on the continent of Europe, proceeded inland some 400 miles, and was expected at some indefinite future time to move forward to a place where it would eventually engage in tactical operations against the enemy is not, in the Board's opinion, per se probative of an intent on their part, concurrent with their absenting themselves without authority, to avoid the hazardous duty of active combat duty against the enemy.[56]

The above doctrine is clearly correct. The accused might have left to visit friends, or have a good time, or go sightseeing, or for other purposes unrelated to hazardous duty. Where such duty is remote, it cannot be expected to weigh more heavily than anything else in the mind of an absentee. It is only when the prospective duty is almost upon the accused that it can be inferred that it weighed most heavily in his mind.[57]

A major problem of imminence of hazardous duty occurs when the accused's unit is in a rest or reserve status. As the above case shows, imminence of duty is not ordinarily presumed in such a situation, but where the unit has been ordered to go back shortly into combat,[58] or where it can be anticipated that such orders will soon be received,[59] imminence of the duty will be considered as established.

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[56] *Id.*, at 68-9.

[57] Weaver, 1 N.A.T.O.-M.T.O. 317 (1943); De Loggio, 30 E.T.O. 19 (1945). See United States v. Johnson, 1 U.S.C.M.A. 536, 4 C.M.R. 128 (1952); Brown, 22 E.T.O. 63 (1945).

[58] Ruggiero, 5 N.A.T.O.-M.T.O. 271 (1945).

[59] Valenzuela, 4 N.A.T.O.-M.T.O. 301 (1944) ("Being in regimental reserve he had reason to anticipate early return to active combat"). See also Holmes, 24 E.T.O. 139, 141-42 (1945):

> The company at the time of accused's departure, had been engaged in combat operations against the German army and . . . further duty of the same hazardous character not only impended but actually occurred throughout the entire period of absence. Although the company was in a "rest area" when

This is especially true where the accused's unit is rotated with others in combat so that it has a certain period of fighting and a fixed period of rest,[60] or where the rest is only a "temporary lull" in fighting.[61]

In addition to a status whereby accused's unit is precluded from engaging in hazardous duty, an inference that accused intended to shirk duty cannot be drawn where he himself is in such a status personally, because in such cases it is unlikely that a person would go AWOL to avoid a duty to which he would in all probability not be subjected.[62] The most controversy here has revolved around those absentees who were in arrest or confinement at the time of absence. As one board of review declared, "in the absence of an affirmative showing that the accused was reasonably subject to release from confinement to participate in hazardous duty and that he knew it, the fact that the accused was in confinement at the time of his departure . . . casts a reasonable doubt upon whether he intended to avoid hazardous duty on that date."[63] But there are decisions which disagree with this.[64]

Of course, it is logical to hold that where accused is in confinement, and he goes AWOL after being informed that he is being released from confinement to be sent back to a unit in combat, the status of confinement still subsisting at the time of the absence does not preclude an inference that the accused went absent to avoid hazardous duty because the accused knows that at an early date his protective status is being terminated and that hazardous duty is therefore in fact imminent.[65] But the cases have gone beyond this, and have held that the status of confinement, restraint, or arrest even without a showing of probable termination does not negate an inference of intent to avoid combat on the theory that such "temporary status of restraint did not render [accused] immune from such hazardous duty or important service which his commanding officer might have seen fit to impose upon him at any time and clearly did not preclude

accused absented himself it was there for purposes of reequipment and maintenance and continued on patrol duty throughout. The area, moreover, was within 400-500 yards of a point reached by enemy artillery fire and hence could not have been far distant from the zone of active combat operations. It was a matter of general knowledge in the company that it would be in the area only a few days before jumping off again and that accused had such knowledge may reasonably be inferred from his presence with the company. . . . Under the circumstances the court was justified in its finding that he was aware of impending hazardous duty and that he absented himself with the design of avoiding it.

[60] Myhand, 16 E.T.O. 81 (1945).

[61] Bowles, 15 E.T.O. 307 (1945). See also May, 25 E.T.O. 11 (1945) ("temporary surcease from the perils ahead").

[62] United States v. Bryant, 13 C.M.R. 867 (1953); Spitzer, 27 E.T.O. 233 (1945) (trainee with service company as truck driver).

[63] United States v. Gendron, 3 C.M.R. 212, 215 (1952).

[64] Kenehan, 24 E.T.O. 378, 381 (1945), where the board declared that "it is immaterial that accused at the time of departure was in arrest in quarters."

[65] Camberdella, 5 N.A.T.O.-M.T.O. 245 (1945); Emory, 6 N.A.T.O.-M.T.O. 51 (1945); Romanowski, 29 E.T.O. 159 (1945).

the commission by him of the alleged offense of desertion."[66] As a leading board of review decision declared:

> Moreover, his restraint might at any time be directly terminated, or constructively terminated by an order to perform military duty or duties, hazardous or otherwise, inconsistent with his restraint. The termination of his restraint was a matter resting in the judgment of his commanding officer. Should the necessity arise, as it well might, that officer could immediately order accused into active duty of a hazardous nature directly or indirectly related to action against the enemy. . . . The imminence of hazardous duty for accused, who was immediately available for its performance at the time he left his place of duty without authority, as a practical matter was no less than it would have been for soldiers granted permission to sleep or rest in the cellar, or to stay there temporarily for any other purpose for an indefinite period. For soldiers in and near the front line of battle where manpower is always a vital and prime necessity, hazardous duty is ever present or imminent, regardless of the fact that they may be temporarily relieved from active participation in combat for a wide variety of reasons.[67]

The fallacy of the above cases is that they equate possible termination of accused's protective status based on speculation that accused's services might be needed so badly he might be restored to duty with probable termination based on facts which were known to the accused and which indicated clearly that termination was not merely possible but imminent. The above cases then go on to speculate that accused feared this possible termination and went absent to avoid the consequences. Such a rule perverts the requirement of imminence of duty to base the requisite inference on.

Of course, a status of confinement does not in law, any more than in fact, preclude the entertainment of the requisite intent; indeed, the accused may have a delusion. Nor does such status alter the rule that where the absence is for the purpose of evading a supposed duty of an important or hazardous nature, the accused is guilty of short desertion. What the status of confinement does is to reduce the probability that such duty is imminent, and by so doing reduce the proba-

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[66] Pergolizzi, 24 E.T.O. 65, 69 (1945). *Accord*: United States v. Mattox, 2 C.M.R. 361 (1952).

[67] Conklin, 18 E.T.O. 95, 99 (1945). See also Paxson, 19 E.T.O. 171, 176-77 (1945):

> In each instance when accused left without authority, he was in arrest of quarters by order of his company commander, inferentially pending court-martial trial for his prior absence or absences. The fact that accused was in a status of restraint pending trial did not render him immune from the hazardous duty of participation in operations against the enemy. . . . Before each absence he was present with his company, which was continually moving forward and attacking the enemy, and he was available, although in temporary arrest of quarters, for any duty, hazardous or otherwise, which his commanding officer might see fit at any time to impose upon him.

bility that the accused went absent to avoid combat below that sufficient to support an inference that this was the motivating purpose.

The vice in the above case is that if it proves anything, it proves too much. Certainly, manpower is a prime need at the front, and hence all soldiers can anticipate the possibility of combat; even those in non-combatant arms may be pressed into service in a desperate situation, as they have in times passed. But it does not follow that such service is either probable or imminent for them, and hence while it is possible that they went AWOL to avoid this type of duty, the degree of probability of AWOL to avoid a duty on the part of those not soon to be subject thereto is too slight to permit an inference from the absence alone that this was the motivating intent.

The same line of reasoning follows in the case of a soldier in confinement. Soldiers in line units are only put in confinement when their derelictions are of such gravity as to warrant withdrawing their services from their unit, and presumably the same manpower considerations which governed the initial decision to deprive the unit of the soldier's services will continue to obtain under the same circumstances. Hence, only a significantly changed, more desperate situation, could induce the accused's commander to terminate the restraint, and unless the accused is aware of this change of situation, a fact which must be demonstrated, he has every reason to believe that he will continue in his protective status. Since, therefore, the probability of termination is slight, an unauthorized absence does not prove that the accused went AWOL to avoid so slight a risk, and accordingly the above cases are not sound.

In addition to proving imminence of hazardous duty, the prosecution is required to prove that accused had knowledge of such imminence,[68] and actual, not constructive, knowledge is required.[69] Nor will a showing that during accused's absence his unit engaged in hazardous duty cure this defect.[70] The evidence of knowledge must be precise, and must pinpoint the facts giving rise to an inference of such knowledge on or before the date of the accused's departure.[71]

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[68] United States v. Tilton, 4 U.S.C.M.A. 120, 15 C.M.R. 120 (1954); United States v. Le Blanc, 2 C.M.R. 612 (1952); Cerrito, 27 E.T.O. 229 (1945).

[69] United States v. Stabler, 4 U.S.C.M.A. 125, 127, 15 C.M.R. 125, 127 (1954).

[70] De Carlo, 27 E.T.O. 151, 153 (1945); Israel, 26 E.T.O. 125, 127 (1945); Lee, 20 E.T.O. 15, 17 (1945); Ramirez, 18 E.T.O. 167, 169 (1945).

[71] Israel, 26 E.T.O. 125 (1945). See also King, 6 E.T.O. 1, 4 (1945):

> The only evidence that accused when he absented himself knew or had reason to believe that his organization was about to engage in such duty, consists of opinions and conclusions of the executive officer of his company as to "indications" and "common knowledge" of impending combat in the company. . . . There is . . . no proof in the record with respect to accused's presence in his unit either at the time of the "common knowledge" or "conversation" in regard

Vague testimony, such as the fact that the accused's unit was at the time he went AWOL in a defensive position,[72] or that he was at an unidentified rear command post,[73] or at S-1 rear,[74] is not sufficient in the absence of a showing that such place itself was either hazardous or because of its location conveyed the threat of future hazards.

The court-martial may, however, draw an inference that the accused had actual knowledge of impending hazards from circumstantial evidence.[75] Thus, for example, when a soldier is in a unit engaging in a well-known battle such as the Battle of the Bulge, judicial notice may be taken of the lines of battle and it may be inferred that he was aware of the normal incidents of combat activity.[76] Likewise, when a unit is small, the court may infer that knowledge of impending hazards disseminated to the whole unit was shared by the soldier who subsequently went AWOL.[77] And evidence that the defendant was close to the battle line will support an inference that he knew the meaning of the sounds which accompanied the fighting.[78] As one board declared:

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to prospective combat or at the time the battalion commander informed his command it "was going somewhere." Such vital facts in the prosecution's case are left to the imagination or at best to speculative inferences which are as exculpatory as they are inculpatory.

[72] Ramirez, 18 E.T.O. 167 (1945); Lee, 20 E.T.O. 15 (1945).

[73] Skuczas, 29 E.T.O. 7 (1945).

[74] Inzitari, 31 E.T.O. 327, 329 (1945).

[75] McFalls, 32 E.T.O. 11 (1945).

[76] Carlson, 17 E.T.O. 255 (1945); Podesta, 26 E.T.O. 397 (1945). See also Romanowski, 29 E.T.O. 159, 162 (1945), where the board declared: "His knowledge of the tactical situation may be inferred from his admission that he knew his organization was in the lines—which can only mean the lines of battle—and that he departed to avoid being sent there."

[77] Myhand, 16 E.T.O. 81, 84-5 (1945), where the board declared:

> In the instant case it was shown that the unit of which accused were members had been fighting near Hunningen, Belgium, for approximately three weeks. It was the regimental policy to rotate the units so that each battalion spent four days in the line followed by two days in the rest area after which it again returned to the line. Also, although the tactical situation at the front was static at the time and the platoon was occupying a defensive position, some twenty casualties had been suffered in the company from mortar and artillery fire during the preceding three weeks and it is thus evident that the orders or anticipated orders to return to the line involved hazardous duty.
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> . . . Lieutenant Forcade also testified that, in directing the platoon sergeant and platoon guide to inform the men of the order, he followed the method usually employed by him to get information to his platoon and which was normally sufficient to accomplish the purpose intended. This being true, and in view of the smallness of the unit, the physical proximity of the members thereof to one another, and the fact that at least two of the members of the squad knew of the order, the court might well have been justified in inferring that [accused] also had knowledge thereof.

[78] Toon, 24 E.T.O. 117, 120 (1945) ("While it does not appear that accused was told his company was in combat, the evidence discloses that his company was about a mile away being subjected to enemy artillery and mortar fire. In the absence of evidence to the contrary, it may be assumed that accused was aware of the bursting of the artillery and mortar shells and the meaning thereof"); Irwin,

> During combat, that there will be certain unmistakable battle activity in and around regimental installations is so self-evident as to be axiomatic within the military knowledge of line officers. . . . There had been the continued rapid movement of the campaign. There is also to be considered the fact that accused was then at an aid station within four miles of the front lines, where he could hardly have failed to see and hear friendly and enemy cannon and to observe the tenseness, the excitement of men, and the rush of traffic. They are the inevitable accompaniments of battle which at a regimental installation could not have been unobserved or misunderstood. Accused received notice of his assignment to a battalion section, which, as he must have known from experience, meant duties as a company aid man or litter bearer in close proximity to the front lines. Hazardous duty related to combat, of which he had knowledge and experience, was therefore imminent, and it may be inferred that he left with specific intent to avoid it.[79]

As an alternative to imminence of hazardous duty, an intent to avoid such duty may be inferred when accused is absent so long that he must have known both that he would be ordered on hazardous duty and would avoid it by the long period of unauthorized absence.[80] Such an inference can only be drawn with caution, and is warranted only in the clearest cases, because the changing circumstances of military duty make it at best difficult to predict with any degree of certainty that a particular individual will have to engage in hazardous duty unless such duty is imminent, and hence the probability that a person would leave to avoid non-imminent hazardous duty which he might never have to face, thus subjecting himself to punishment for AWOL unnecessarily, is equally diminished. The temptation to use hindsight, which is strong in such a case, must be resisted, and only if the evasion of duty appeared reasonably certain to follow as a consequence from the AWOL can the inference be drawn. However, where hazardous duty recurs on a fixed schedule, the inference may be drawn although the duty is not imminent. Thus, in one case where an accused, who was a member of a bomber crew, went AWOL for a period beyond the normal interval between missions, the board said:

> Another consideration weighs against accused. Shortly before he absented himself and in the same conversation in which he told the co-pilot that he intended to quit flying, accused stated "I will

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21 E.T.O. 233, 235 (1945) ("All the military world knows, there was not a possibility that accused could be at a battalion command post within four kilometers of battle and not know of the existence thereof").

[79] Pittala, 17 E.T.O. 131, 133-34 (1945).

[80] Wallrath, 66 B.R. 71, 715 (1946). See MANUAL FOR COURTS-MARTIAL §164a, 314-15 (U. S. Army, 1951), where it is stated that the inference of intent to avoid duty may be drawn if "the period of his absence was of such duration and under such circumstances that the accused must have had reasonable cause to know that he would miss a certain hazardous duty or important service."

see you in a couple of weeks in the guardhouse, maybe. I am taking a vacation." The court could reasonably have found that the period of absence he contemplated was so long that as an experienced member of a combat crew, aware of the frequency of his previous missions, he knew that he would miss flying on a combat mission during such absence.[81]

In addition to those circumstances mentioned above which would tend to show that accused entertained the specific intent to avoid combat, the court must of course take into consideration those items of evidence which give rise to a contrary inference. Foremost among such items is the fact that accused volunteered for the hazardous duty,[82] for it is unlikely that a person would seek to avoid duty unless he had an aversion thereto, and people do not normally volunteer for duties they do not want to engage in.

Also of significance is the fact that the defendant returned before the hazardous duty commenced,[83] or had planned to do so.[84] Likewise, an inference of motivating aversion to combat is dispelled when the accused voluntarily returns during the pendency of the duty he is charged with seeking to avoid.[85] Thus, one case relied upon the fact that accused "returned of his own volition while the possibility of combat continued,"[86] while another declared:

The probability of a submarine attack appears to have been equally

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[81] Urban, 12 E.T.O. 1, 5-6 (1944).

[82] United States v. Shull, 1 U.S.C.M.A. 177, 2 C.M.R. 83 (1952); *cf.* Goulet v. The Queen, 1 Can. Ct. Mar. App. Rep. 19 (1952). See also United States v. Logas, 2 U.S.C.M.A. 489, 9 C.M.R. 119 (1953); United States v. Perry, 10 C.M.R. 387 (1953).

[83] United States v. Gendron, 3 C.M.R. 212, 215 (1952).

[84] See Pratt, 12 B.R. 365, 367 (1942), where the Board said:

There is no evidence in the record that accused quit his organization with intent to shirk any service, nor are there any circumstances in evidence from which such an inference may be drawn. On the contrary . . . accused intended to return to camp after buying some Christmas presents and seeing a girl. The accused had gone from Fort Hancock, Texas, within one mile of his duty station, to the place where he was taken into custody in a little over two hours. It may reasonably be inferred that the return trip to camp would take no longer. The accused had no duty of any character to perform until six o'clock on the morning of December 22nd, when he again was to go on a twelve hour patrol. These circumstances are consistent with an intention on the part of accused to return to his organization in time to perform the next duty required of him, and entirely fail to show that the accused quit his organization with intent to shirk important service.

[85] Brown, 16 E.T.O. 89, 92-3 (1945):

The record as a whole strongly tends to negative the inference of an intent to avoid hazardous duty. It is uncontroverted that when he left regimental headquarters he was on his way back voluntarily, to his unit following the completion of his assigned mission. He had discharged his share of the burden of combat prior to his absence, he voluntarily surrendered at the end thereof and was immediately restored to his own squad with which he performed creditably in further extensive combat operations. Accused's denial of an intention to avoid hazardous duty is consistent with the evidence.

[86] Frank, 13 B.R. 109, 110 (1942).

> as great at the time the accused returned to his organization as during the time of his absence. Furthermore, there is no evidence that the accused had showed any fear of such an attack or any desire to avoid his duties in connection therewith. On the contrary, the fact that permission was given to seven men at a time to be on pass in the town, together with the fact that the commanding officer was engaged in activities incident to the relief of the organization, indicates that the organization was probably under less apprehension of an attack on March 2nd, than when it assumed the defense of Bandon. This fact in turn tends to repudiate the existence of fear on the part of the accused of an impending, hazardous military duty or the existence of an intent to avoid such duty.[87]

As noted above, timing of an absence so that it results in evasion of duty is significant circumstantial evidence that this was the purpose of the absentee. By a parity of reasoning, timing of the absence so that it occurs after the hazardous duty terminates should be strong evidence that the defendant did not go AWOL to avoid combat. This issue was raised in one case where accused went absent without leave from his unit after it had been withdrawn from combat on the front line for reorganization in a rear assembly area. The board noted that if accused's intent was to avoid combat "it seems strange, at first glance, that he would have chosen the very moment when the hazards appeared to be on the decrease rather than on the increase," but sustained the finding of intent to avoid hazardous duty on the ground that the respite was only temporary, and combat loomed ahead once again.[88] Were it not for the fact that accused knew he would shortly have to face hazardous duty once again, it would seem this inference would be unsupportable, but as it is, the decision is not an unreasonable one, because the imminence of recurrent duty deprives the respite of probative significance it would otherwise have.

SIGNIFICANCE OF EVASION OF EMBARKATION

The legislative history of short desertion shows clearly that while embarkation as such was not considered to be within the ambit of the statute, evasion of embarkation was considered as evidence from which a court-martial could infer that an accused intended to avoid hazardous duty or shirk important service if he had reasonable grounds to believe that such duties would fall to him upon arrival at the overseas destination. Viewed from this angle, intent to evade embarkation is of much significance in the law of short desertion. But, as will be demonstrated below, this significance lies in its evidentiary value, rather than as an element of the substantive crime.

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[87] Calvin, 13 B.R. 113, 116 (1942).
[88] Martin, 19 E.T.O. 395, 396 (1945).

The earliest draft of the short desertion statute, Article 55 of the Ansell-Chamberlain Bill of 1919, punished as a deserter one who absented himself from his unit or place of duty "with intent to avoid hazardous duty."[89] General Crowder commended this section of the bill during his testimony before the Senate Subcommittee considering revision of the Articles of War and said that it provided for "creation of what the British call short-time desertion."[90] He declared that "if we had had a statute of that kind, these more than 14,000 men that were absent at Hoboken at the time they were expected to embark could have been tried for short desertion, or an abandonment of the command at a time of perilous duty."[91] Since the 1920 Articles of War reflect General Crowder's views,[92] it is clear that the above statement must be taken to reflect the policy of the statute.

This statement shows that mere embarkation itself was not the object of the statute. There was nothing perilous about embarking at Hoboken in 1918. Nor were sea voyages themselves considered dangerous. The statute would never have been proposed or passed to punish with death soldiers adverse to taking ocean trips; it is absurd to believe that Ansell, with his well-known tenderness toward absentees, could have drafted such a provision, or Crowder could have approved it.

It is clear that General Crowder was concerned with the special circumstances under which embarkation was being evaded,[93] and these special circumstances were that the troops were being sent overseas into combat. It was not the embarkation as such that was perilous, it was the fighting in France. By the same token, it was not the embarkation that was important, it was the combat activity and service imminently connected therewith and in support thereof in France. General Crowder was not concerned with those troops who

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[89] *Hearings Before a Subcommittee of the Senate Committee on Military Affairs*, 66th Con., 1st Sess., on S. 64, *A Bill to Establish Military Justice*, 14 (1919).

[90] *Id.*, at 1162.

[91] *Ibid.*

[92] Memorandum of General E. H. Crowder, Judge Advocate General of the Army, August 2, 1920, p. 3, to be found in the Crowder Papers, Western Historical Manuscripts Collection, General Library of the University of Missouri, Columbia, which states that the Senate amended the Ansell-Chamberlain Bill by "striking out *the entire measure following the enacting clause* and substituting therefor the text substantially as it appears in the law as passed, a text prepared very largely in my office, reflecting my own views and recommendations and rejecting the vitals of Senator Chamberlain's proposed revision."

[93] Letter from General E. H. Crowder, Judge Advocate General of the Army, to Congressman Julius Kahn, Chairman of the House Armed Services Committee, July 7, 1919, p. 2, found in the Crowder Papers, *supra*, note 92, stating:

> Absence without leave at a Port of Embarkation or immediately prior to embarkation operates to disintegrate an army and might lose a campaign; while absence without leave from a training camp might be, comparatively speaking, a trivial offense. . . . Would not these limits of punishment prove most inadequate and invite disintegration of the Army under the special circumstances prevailing at our Ports of Embarkation during this war?

objected to being tourists, but with those who would not fight on foreign soil and who found evasion of embarkation the most effective means of effectuating such intent. For it has been rightly observed: "The fact is that the best way for a serviceman to avoid the hazards of duty in a combat zone is to absent himself from the service before he is sent overseas to that zone."[94]

World War I, it must be remembered, was the first major overseas war America fought. Prior to that, soldiers who desired to avoid fighting could not do so by evading transportation with their unit to a combat area because the fighting areas were so close by that they could have been sent forward at any time.[95] However, once it became necessary to ship men overseas, if a soldier missed a shipment he was assured of a substantial delay until the next shipment was made. Each such delay caused by unauthorized absence delayed the period of time when the soldier could be sent into combat, and consequently reduced both the time he would spend in combat and the probability that he would see combat or any overseas duty at all since the war might end before he was shipped. Accordingly, evasin of embarkation became the most efficient means of avoiding hazardous duty.

Moreover, there was another incentive to evade embarkation. Until a soldier is definitely scheduled for embarkation, he does not know that he is going to be sent into combat; it may be that he will spend all of his time in the United States. Once, however, he is so scheduled, he knows he is going into a combat zone, and his chances of seeing actual fighting are much enhanced. Hence, if he desires to avoid combat, he must choose between evasion of embarkation and going AWOL once he arrives overseas. Of the two alternatives, evasion of embarkation is much more likely to effectuate his plan. If the soldier goes AWOL in a foreign country, he can easily be identified by his accent, and if the people there do not speak English, or are of a different race, it will be difficult for him to obtain a job to support himself, or conceal himself in the general civilian population. However, if he goes absent without leave and avoids embarkation, he can fade into the civilian populace, find his way around, get work, and otherwise prevent detection. Accordingly, as a means for avoiding overseas duty, evasion of embarkation is undoubtedly the most effective scheme. As one board of review has declared:

The specification describes the "hazardous" duty which the ac-

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[94] United States v. Olson, 11 C.M.R. 613, 617 (1953).

[95] See Lonn, DESERTION DURING THE CIVIL WAR 165-79 (1928). *But see* 163-4: "So determined were [bounty-jumpers] never to face the enemy's guns, that some of them would make the attempt after they had seen their comrades actually shot as they broke the ranks while being marched from the station to the wharf at some terminal."

cused sought to avoid as "entrainment for a port of embarkation." Although such an entrainment, as a separate incident, cannot reasonably be regarded as hazardous, as the first step toward embarkation for foreign service, it obviously did involve hazardous service. Since . . . the service which was actually avoided by the absence of the accused [actual landing operations] was hazardous, the deficiency in the specification is immaterial.[96]

Numerous cases illustrate how evasion of embarkation to a combat area has been used to avoid participation in combat.[97] In one, for example, accused was charged with absence without leave with intent to avoid hazardous duty as part of a landing team. Accused with his unit had helped to load waterproofed equipment on shipboard and had eaten and slept on the ship to which he was assigned. Less than a day before the ship sailed, accused absented himself. It was held that "although the destination of the organization . . . had not been revealed to the accused, he must have known that the organization was preparing to depart . . . for some type of hazardous duty," and hence the inference was justified that the accused's purpose was to evade such duty.[98] Likewise, in another case, where a rifleman went AWOL from a unit after company vehicles had been waterproofed and loaded on shipboard and "when it was obviously preparing for an amphibious operation and embarkation was imminent," a board of review held the inference warranted that at the time accused absented himself he "knew hazardous duty in the form of combat with the enemy was imminent" and that he intended to avoid such combat.[99]

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[96] Sapp, 15 B.R. 379, 381 (1943).

[97] Domingos, 25 E.T.O. 221 (1945); Roberts, 23 E.T.O. 63 (1945); Brigriglio, 19 E.T.O. 283 (1945); Russo, 19 E.T.O. 71 (1945); Giombetti, 17 E.T.O. 345 (1945); Carey, 11 E.T.O. 293 (1944); Heppding, 5 E.T.O. 77 (1944); Boros, 4 N.A.T.O.-M.T.O. 415 (1944); Becerra, 4 N.A.T.O.-M.T.O. 393 (1944); Kemmerer, 4 N.A.T.O.-M.T.O. 171 (1944); Hanson, 4 N.A.T.O.-M.T.O. 39 (1944); Frain, 3 N.A.T.O.-M.T.O. 335 (1944); Clementi, 3 N.A.T.O.-M.T.O. 23 (1944); Wilson, 3 N.A.T.O.-M.T.O. 5 (1944); Garner, 3 N.A.T.O.-M.T.O. 1 (1944); Librandi, 3 A.-P. 201 (1945); Olson, 1 A.-P. 141 (1943); Valdes, 1 A.-P. 51 (1942).

[98] Hammock, 16 B.R. 275, 277 (1943). See also Rehm, 4 N.A.T.O.-M.T.O. 131, 133 (1944):

There was evidence that at the times alleged . . . accused's company was in a staging area on a status of alert, where its vehicles were being waterproofed and preparations were under way for trans-shipment by water to a new combat zone, the Anzio Beachhead. It was commonly known among the men that amphibious landings had been made by American troops at nearby Anzio and that engagements with the enemy were in progress there. It was shown that accused did not voluntarily return to his command after his first absence but was apprehended and returned to his unit where he again absented himself without leave before the organization sailed.

[99] Martin, 4 N.A.T.O.-M.T.O. 421 (1944). And in Boggs, 33 E.T.O. 321, 323 (1945), the board of review declared:

The court was . . . justified in inferring that he . . . departed to avoid hazardous duty. . . . He had disappeared a few days previously when about to be taken from England to France during war time when actual combat was taking place in France. On 5 January he knew he was again to be taken to France. He was under arrest. His unexplained absence extended over a period of 6 months.

Where an accused has been informed that he is being shipped overseas to perform particular hazardous or important service, there is no problem of finding an intent to evade such service from the evasion of embarkation. A more difficult problem is presented when the accused's destination and duties are secret, and therefore not revealed to him, as so often happens in the military,[100] or where he has as yet not been assigned to specific duties. In such situations, were it necessary to prove that the accused in fact was going to be assigned to hazardous or important service, and that he went absent with knowledge of such duties, many clear cases of intent to evade embarkation could not be charged as short desertion because neither accused nor the court-martial trying him knows as a fact precisely where the accused is going or what he is going to be doing when he gets there. Indeed, in a sense one can never know since it is always possible that although the accused seems clearly destined for important service, the exigencies of the service will divert his activities at his destination point from hazardous or important duty to routine activity. However, this problem is not presented because proof of intent to avoid such service, as distinguished from proof that such service was in fact avoided, is all that is required. And in the typical case of evasion of embarkation, intent to avoid embarkation forms the basis for inferring intent to avoid such service.

United States v. Clancy[101] serves as good illustration of this point. There, accused was placed on a transfer list for shipment to a "tropical climate" and orders were issued directing him to proceed to Camp Stoneman, California, a staging area for shipment to the South Pacific. In addition, his unit received an A.P.O. number, indicating shipment overseas. The accused likewise was orally told of this. He then went AWOL once, was picked up, and again immediately thereafter absented himself, thus indicating an intent to avoid embarkation.

The board, of course, did not know precisely where accused was destined for, and neither did he. But both did undoubtedly know that many American troops were being sent to the South Pacific for combat and other important service, and when a soldier evades embarkation for a theater where there is a reasonable chance that he is going to be ordered to perform important service, in the absence of a cogent and compelling explanation of some other intent, it is reasonable to infer that the accused had as his purpose for evading embarkation the further intent to avoid hazardous or important service which he feared he might be ordered to engage in. Indeed, unless it can be assumed that the soldier does not like being in a foreign

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[100] See Pennington, 6 E.T.O. 351, 355-56 (1944).
[101] Clancy, 29 B.R. 215 (1943).

country at all, an explanation sufficiently unlikely in the average case to warrant rejection without strong supporting evidence, and unless another explanation can be given, intent to avoid unpleasant important or hazardous duty would seem to be the only motive which could reasonably be inferred. Accordingly, intent to avoid hazardous or important service can logically be inferred in the typical embarkation evasion case from intent to avoid embarkation.

The rule that evasion of embarkation is evidence of intent to avoid service ultimately to be performed on arrival rather than the shirking of important service in itself results in obviating another problem, that of a mere delay in overseas movement. Obviously, if the taking of a sea voyage is the important service avoided, then if the accused will but evidence his intent to take the trip two years later, he cannot be convicted of short desertion because at no time did he ever intend to avoid the trip, but merely to postpone it.

An Air Force board of review was faced with this problem in *United States v. Gorringe*.[102] There, an airman went AWOL with intent to delay or postpone his shipment to Europe, but with the ultimate intent to go. The board, faced with the problem of detecting an intent to shirk the important service of shipment, when the evidence indicated that accused did in fact intend ultimately to go overseas, and merely wanted a postponement, twisted and distorted the word "shirk" until it no longer meant "avoid" but was stretched to mean "delay." After relying on two inapplicable cases, in one of which the sailors shirked work by doing less of it, and in the other the soldier avoided seven days of combat, the board declared: "Temporary delaying tactics cannot be permitted. The delayed performance of such important service may result in losses vital to the nation."[103] Based on this rationale, the board affirmed the conviction for desertion.

If the important service shirked is deemed to be the sea voyage, the result is patently absurd. It can be of no consequence to anyone, (except for space availability factors) whether the accused takes his ocean trip at the time he is scheduled for it or three years later. Such duty is of no more consequence than a routine medical examination, or the completion of routine forms, or a host of other routine duties. Indeed, a sea voyage per se is most closely analogous to a mere training mission, which has never been considered "important." Accordingly, by postponing a cruise the defendant is neither shirking duty, nor is the duty important.

If, however, it is the duty to be performed overseas which is important, then the result makes sense. By postponing the voyage ac-

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[102] 15 C.M.R. 882 (1953).
[103] *Id.*, at 893.

cused misses, pro tanto, the duty to be performed at his destination. A soldier who arrives at the scene of battle after his comrades have won the war is not exculpated from a charge of avoiding important service merely because he eventually puts in an appearance. And if he intentionally arrives after half the battle is over, he has shirked the first half of the engagement. Moreover, since the statute proscribes shirking service, and does not provide for any minimum quantity or time of duty shirked, any postponement whereby accused misses some duty is desertion. Accordingly, if a soldier intentionally seeks to postpone shipment so as to avoid some important service overseas, he is guilty of short desertion.

The inference of intent to avoid ultimate duty through evasion of embarkation must be predicated on a reasonable possibility that the accused will be required at his destination to engage in important or hazardous service. The mere fact that someone at the overseas station can be found who engages in such duty does not mean that it may be assumed that there is sufficient likelihood that accused will be doing so to warrant the inference that accused intended to avoid this duty by stateside absence. Most people seek to avoid duty only when the possibility that they will be called upon to perform it is substantial. In addition, where the accused knows what his duty is, if the duty is not hazardous or important, intent to evade the duty or embarkation generally will not be short desertion. But if there is a significant possibility that the absentee will be required to perform important or hazardous duty at his destination, and he evades transportation thereto, the inference that he intended to avoid such ultimate duty by evading transportation to the place where it was to be performed is warranted.

INTENT TO AVOID EMBARKATION

Proof of intent to avoid embarkation through circumstantial evidence involves many of the same steps as proof of intent to avoid combat. The two basic elements on which the inference generally rests are imminence of overseas duty and knowledge of such imminence, so that the accused knew that his absence would result in avoiding the duty.[104]

To be imminent, overseas shipment must be more than merely probable. It must be threatening to occur immediately. It is not sufficient that such shipment is more likely than not to happen; it is also requisite that the likelihood is impending at the time of ab-

[104] Hodge, 43 B.R. 41 (1944). See Walkup, 19 B.R. 49 (1943). The knowledge required is, of course, actual knowledge. United States v. Stubler, 4 U.S.C.M.A. 125, 15 C.M.R. 125 (1954).

sence.[105] The reason for the rule is that where an accused is at a replacement depot or staging area and faced with reasonable prospects of going overseas in the not too distant future, he may absent himself for any number of reasons other than to avoid embarkation; it is only when he has reason to believe that his embarkation is imminent that it can reasonably be inferred that his absence was with the specific intent to avoid it.[106]

The major issue as to imminence of embarkation has arisen in cases where a soldier has been transferred to an overseas replacement depot or staging area and has thereafter gone AWOL either before or upon arrival at the area. It has been uniformly held that such transfer, or entrainment therefor, is not sufficient in itself to show that overseas embarkation was imminent.[107] The reason for the rule is that the accused might have remained at the replacement depot for an indefinite period of time before he, or the unit to which he was eventually assigned, was selected for transfer to a port of embarkation. Accordingly, such transfer would be, in the absence of any additional showing of imminence, merely "preparatory" and not sufficiently probative to support an inference of intent to avoid embarkation.[108]

Of course, additional facts may support a finding of imminence of embarkation even at a preparatory stage of movement. Thus, rapid preparations for shipment will be probative of this fact.[109] For example, in one case new equipment appropriate for combat landing was issued to accused's unit; it made practice combat landings; and it worked night and day to receive and ship its equipment so that it would be fully equipped for combat within 48 hours. It was held that this showed that embarkation was imminent, and accordingly that accused, who went AWOL just prior to embarkation, did so to avoid such embarkation.[110] Likewise, where the circumstances surrounding the entrainment indicate a substantially continuous movement through a port of embarkation and on to an overseas destination, evasion of such entrainment will indicate intent to avoid embarkation.[111]

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[105] Rose, 43 B.R. 377, 378 (1944).

[106] Uyechi, 45 B.R. 233, 237 (1945).

[107] Moore, 41 B.R. 43 (1944); United States v. O'Connor, 1 (A.F.) C.M.R. 436 (1949); Kallenberger, 4 J.C. 441 (1949); Johnson, 67 B.R. 325 (1947); Mugan, 43 B.R. 231 (1944); Hodge, 43 B.R. 41 (1944); Lewis, 42 B.R. 19 (1944).

[108] Closson, 44 B.R. 235, 238 (1944); Pattillo, 42 B.R. 41, 42-3 (1944).

[109] Cantwell, 7 E.T.O. 55, 57 (1944); McElroy, 16 B.R. 161, 163-64 (1943).

[110] Sapp, 15 B.R. 379 (1943).

[111] Green, 47 B.R. 191, 193 (1945), where the board of review declared: "The movement was not preparatory, but a part of the actual progression of movement overseas, after preparation was completed at the Replacement Depot. The circumstances were sufficient to apprise the accused that embarkation for overseas service was imminent and that his absence would avoid it. The case is thus sharply distinguished from recent cases involving movements to Replacement Depot "Preparatory for Overseas Replacements."

To prove an intent to avoid embarkation through circumstantial evidence, it is also necessary to show knowledge on the part of the accused of the imminence of embarkation.[112] Such knowledge cannot be inferred from the fact, standing alone, that accused was placed on orders for embarkation, even when the order contains a distribution code which would normally include him,[113] for "while such special orders expressly provided for distribution thereof to the accused, there was no showing that such distribution had been actually effected or that the accused had knowledge of such orders."[114] Nor can such knowledge be inferred from the fact that accused was a member of an organization which was scheduled to move overseas,[115] for a soldier is generally not "informed of the normally secret detailed plans and orders for the movement."[116]

In several cases attempts have been made to cure this deficiency by alerting accused's unit and reading them a so-called "desertion letter." For example, in one typical case,[117] accused went AWOL for 6 days in England after having been read a letter which stated that his unit was alerted and under orders to participate in the invasion of Europe, that this operation would be both hazardous and important, within the meaning of Article of War 28, and that any AWOL would be deemed desertion. He stated that he knew his unit was going but "did not look for them to move for quite a while" and "figured that if they moved they'd move" at a later date. He stayed in a nearby town and intended to return to his unit.

The board of review rejected the prosecution's "argumentative inference" that since the accused had received actual notice of the status of his unit as under orders for invasion and then went AWOL on the day following this notice, it could be inferred that he did so to avoid invasion. It declared:

> In the instant case the accused's unit was under invasion orders and was alerted for such purpose, but it remained at its station during accused's absence and accused did not miss any engagement or important duty. The record does not indicate any preparations for forward movements which put the accused on notice

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[112] United States v. Vick, 3 U.S.C.M.A. 288, 12 C.M.R. 44 (1953); United States v. Yoshikama, 14 C.M.R. 465 (1953); United States v. Johnson, 11 C.M.R. 844 (1953); United States v. Begshaw, 9 C.M.R. 383 (1953); United States v. Hensley, 8 C.M.R. 197 (1953); United States v. Hunton, 7 C.M.R. 110 (1952); United States v. Hutton, 6 C.M.R. 442 (1952); United States v. Walling, 1 C.M.R. 145 (1951); Nigg, 2 E.T.O. 1 (1943); Thomas, 34 B.R. 141 (1944); Webster, 16 B.R. 167 (1943); Wicklund, 15 B.R. 299 (1942); Henning, 14 B.R. 281 (1942).

[113] United States v. Knapp, 13 C.M.R. 744 (1953); United States v. Hobson, 12 C.M.R. 824 (1953).

[114] United States v. Hooper, 7 C.M.R. 148, 149-50 (1952).

[115] McGrath, 18 B.R. 53, 55 (1943).

[116] Collins, 49 B.R. 217, 219 (1942).

[117] Newton, 7 E.T.O. 65 (1944).

> that it was imminent and the time of such movements remained indefinite and uncertain. The relevancy of these facts cannot be ignored in searching for accused's intent.[118]

And several other cases have overturned a conviction for short desertion based on the attempt by the accused's unit to establish its case in advance by reading the accused a "desertion letter,"[119] especially when the accused demonstrated another motive for his absence, such as a desire to visit a girl friend,[120] or fear of being sent to a mental hospital,[121] or indicated an intent to return shortly, such as by leaving money with a fellow soldier for safe-keeping.[122]

Knowledge of the imminence of embarkation on the part of the absentee cannot be proved by showing that this was "common knowledge" in his unit,[123] that there were "recurrent rumors of departure" in his organization,[124] or that departure "was the subject of much dis-

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[118] *Id.*, at 74.

[119] Armas, 46 B.R. 319 (1945); Hodge, 43 B.R. 41, 45 (1944); Moran, 34 B.R. 265 (1944); Pennington, 6 E.T.O. 351, 357 (1944). Compare Clancy, 29 B.R. 215, 221-22 (1943), where under the circumstances the reading of a "desertion notice" was held to be an incriminating factor.

[120] Gray, 9 E.T.O. 119, 127 (1944).

[121] De Carlo, 18 E.T.O. 125, 129 (1945):

> Proof that he absented himself without leave on 2 May after he received notice from the reading of the letter dated 21 April that his organization was under orders to participate at some indefinite future time in the invasion of the continent, was alerted for that operation, and that the operation would constitute hazardous duty and important service, does not, without more, furnish the necessary probative basis from which may be inferred the ultimate fact of intent to avoid such duty or service . . . [Accused] stated that he did so to avoid being sent to a mental hospital for treatment and gave a factual basis for believing he was about to be sent to such hospital. This was introduced by the prosecution and was neither inherently improbable nor refuted by the other facts in evidence. The prosecution, therefore, failed to prove one of the essential elements of the offense charged, namely, the specific intent to avoid hazardous duty or to shirk important service.

[122] Durie, 6 E.T.O. 379 (1944), where the board of review declared at p. 385: "Proof that accused went absent without leave when his battery was on an alert status after he received notice that at some indefinite future time it was intended that it should participate in a continental European invasion, without more, does not furnish the required probative basis from which may be inferred the ultimate fact of intent."

[123] Barfield, 30 E.T.O. 183, 185-86 (1945). See also United States v. Marcum, 2 (A.F.) C.M.R. 855, 861 (1950).

[124] Sfer, 44 B.R. 317, 319 (1944); Crowley, 14 B.R. 9, 12 (1942); *cf.* Fragassi, 13 B.R. 329, 331 (1942). In *Sfer*, the board declared:

> Although Camp Anya, where the organization of which the accused is a member was formed, and Camp Ross, where it completed its training, are both in the area of Los Angeles Port of Embarkation at Wilmington, California, the organization had been there in training from April to August. It is not shown that its embarkation was in fact then imminent, or that it ever did embark. Still less is knowledge thereof imputed to accused. An announcement in April that the organization would train for overseas duty and then have a last furlough followed by a required reading of the Articles of War, some time in July and furlough notices posted on the bulletin boards the last of July, along with recurrent rumors of departure over an indefinite period of time, do not, either in law or in fact, so charge the accused with notice of imminent embarkation as to render unreasonable any hypothesis explaining his absence except that of intention to avoid overseas service.

cussion" in his group[125] without showing that he partook of this information. Likewise, it is not sufficient to show that the absentee's organization had been restricted to short term passes,[126] that it was making routine dispositions preparatory to departure overseas at some future time,[127] or that accused "supposed" his organization was going to move "at some time."[128] As a board of review declared in one case:

> There is nothing in the evidence from which it may reasonably be inferred that accused knew that the embarkation of his organization for overseas duty was imminent, or that his absence would result in his avoiding embarkation. It was not proved that accused was present on any of the occasions when the members of his company were informed, at formation, that they were to depart for overseas duty, or when the communication was read to the company as to the effect of absence without leave at the time of embarkation. In fact, accused, because he was a cook, did not ordinarily stand formation. There was no evidence that the warning that the company was about to leave for overseas duty, and the fact that an order had been issued directing that one barracks bag should be kept packed for embarkation, was ever brought to the attention of accused. The mere fact that accused was then a member of the organization concerned is not sufficient to provide a reasonable inference that he knew of the contemplated movement, nor was the fact that he absented himself approximately one week prior to the embarkation . . . sufficient to establish such an inference of knowledge by accused that embarkation was imminent. The company had been alerted three times before. The alert had been terminated and passes were then issued. It was not established in evidence that this particular alert was more likely to result in actual embarkation than those which had previously occurred. This alert was also terminated, and accused was then granted a pass.[129]

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[125] Sheffler, 18 B.R. 59, 62 (1943).
[126] Fragassi, 13 B.R. 329 (1942); *cf.* Neville, 2 E.T.O. 135 (1943).
[127] Collins, 49 B.R. 217, 219 (1942).
[128] Sinclair, 18 B.R. 153, 157 (1943).
[129] *Id.*, at 156-57. And in Armas, 46 B.R. 319, 324 (1945), the board of review declared:

> It is apparent that, in the absence of direct evidence of the accused's intent, the evidence must leave no reasonable doubt that the departure is actually immediately impending and that the accused knew, or had reason to know and accordingly believed, this to be the situation, in order to justify an inference that his absence was designed to avoid overseas movement.
>
> The facts of this case fail to measure up to this standard. The evidence leaves no doubt that the purpose of the crew's presence at Hunter Field, a staging wing, was to prepare to proceed overseas, and that early movement was contemplated, and that these facts were made known to the accused. However, it was equally clear that there would be some delay in actual departure and that such departure would not occur immediately upon the expiration of the seven days' furlough granted the accused. He knew that the dental work required by the bombardier was expected to take eleven days. It was not unreasonable for him to assume that final preparations thereafter would consume some brief period before actual departure. No orders fixing the time for the movement had been issued, and a tone of uncertainty as to the actual time pervaded the circumstances of the case. Furloughs were granted for travel to distant points, including California. The accused was told to

Where knowledge of imminent embarkation on the absentee's part is lacking, other circumstances which might indicate an intent to avoid overseas service will generally not be held to be sufficient to warrant this inference. Thus, an attempt to commit suicide,[130] a dislike of the military service,[131] or the theft of an automobile to get away in were all held to be "as consistent with innocence of the offense charged in this specification as with guilt thereof."[132] As the board declared in the last-mentioned case: "Any inference that he . . . intended to shirk important service, by subjecting himself to the possibilities of confinement for his larceny, is at best a suspicion, conjecture or speculation upon which we cannot premise a finding of guilt of the offense charged."[133] This result is also reached when the accused goes AWOL after the shipment has already left.[134]

Knowledge of the imminence of overseas shipment may be shown by the fact that the accused was given copies of his orders sending him overseas,[135] was informed that his unit was "hot for combat,"[136] saw his name on a particular shipping list in embarkation orders or his unit's combat equipment being loaded on shipboard,[137] witnessed feverish preparatory activities prior to departure,[138] or drew supplies immediately preparatory to departure.[139] The inference of intent to avoid embarkation may be based on such knowledge of imminent de-

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apply for an extension of his furlough if he should need it, and then told not to do so, as it would not be granted, but rather for reasons of policy than for any disclosed specific purpose. He was required, along with all his crew mates, to sign a mimeographed statement that he understood that his furlough would not be extended and he would be ordered out on hazardous duty and important service practically immediately upon his return, and that failure to return might be held a violation of the 28th Article of War. However, outside of any consideration of the unconvincing and inconclusive character of such routine and stereotyped warnings, however seriously intended by their authors, the signing of this document preceded the actual discussion of a possible extension of the furloughs, as the pilot found it necessary to refer thereto after the furloughs were issued and after the bombardier had suggested such extensions. The effect of the certificate was offset by other circumstances, and rendered inconclusive.

[130] Moran, 34 B.R. 265, 268 (1944).

[131] United States v. Marcum, 2 (A.F.) C.M.R. 855, 862 (1950).

[132] United States v. Mathis, 12 C.M.R. 590, 592 (1953).

[133] *Ibid.*

[134] *Ibid.*; United States v. Priest, 10 C.M.R. 486 (1953).

[135] United States v. Vick, 3 U.S.C.M.A. 44, 12 C.M.R. 44 (1953); United States v. Thomason, 3 C.M.R. 797 (1952). See also United States v. Willingham, 2 U.S.C.M.A. 590, 10 C.M.R. 88 (1953), where it was held that circumstantial evidence showed that accused received a copy of his transfer orders.

[136] Murphy, 10 J.C. 130, 132 (1950), reversing Murphy, 10 J.C. 125 (1950).

[137] Armas, 46 .R. 319, 323-24 (1945); Cantwell, 7 E.T.O. 55 (1944).

[138] Sapp, 15 B.R. 379 (1943); McElroy, 16 B.R. 161 (1943).

[139] United States v. Cannon, 3 C.M.R. 281, 284 (1952); Cantwell, 7 E.T.O. 55 (1944).

parture and an unauthorized absence which results in accused's avoidance of the shipment.[140]

Of course, the inference of intent to avoid embarkation from an absence without leave right before a known shipment can be strengthened by other circumstantial evidence. For example, in one case accused's desire "to avoid going overseas with the shipment to which he was assigned and which he knew was about to depart is fully evidenced by his insistence . . . that he was physically disqualified and the persistence with which he endeavored to obtain medical support for his contention."[141] And in another case, where the accused had gone AWOL after being notified that his efforts to gain exemption from overseas duty had failed and he was to be sent to Korea, the Canadian Court Martial Appeal Board found the inference of intent to avoid shipment to Canadian combat forces in Korea sustained by the following circumstances:

> He hears the warning of the Officer Commanding . . . ; he refuses to sign the warning order because he could have been charged as a deserter in case of absence; he takes advantage of the leave privileges granted only to those who are about to leave; he refrains to draw the necessary equipment at the Quartermaster stores; he tries to avoid medical preparations; he absents himself when he knows that the whole detachment must stay in barracks on the eve of the departure; he knows about the departure of the detachment and misses it; he admits not to have notified anybody for fear of one coming to pick him up.[142]

A defendant may, of course, rebut the inference of intent to evade embarkation through a timely absence. He may show that he did not believe he would go at once,[143] and that he had other motives, such as assisting a sick relative,[144] or visiting friends.[145] It has also been held that the fact that accused believes he is in a "hold" status will overthrow any inference from such circumstantial evidence,[146] as will the fact that the absentee volunteered for the overseas duty he is charged with shirking.[147]

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[140] United States v. Hemp, 1 U.S.C.M.A. 280, 3 C.M.R. 14 (1952); United States v. Justice, 14 C.M.R. 669 (1953); United States v. Mischke, 8 C.M.R. 481 (1952); United States v. Aikman, 8 C.M.R. 199 (1953); United States v. Vestal, 3 C.M.R. 769 (1952).

[141] Parmelee, 41 B.R. 159, 166 (1944).

[142] Goulet v. The Queen, 1 Can. Ct. Mar. App. Rep. 19, 23 (1952).

[143] Nigg, 2 E.T.O. 1 (1943).

[144] United States v. Peregrina, 8 C.M.R. 293 (1953).

[145] Neville, 2 E.T.O. 135 (1943).

[146] United States v. Bryant, 13 C.M.R. 867 (1953). See also United States v. Emery, 14 C.M.R. 296, 300 (1954).

[147] United States v. Logas, 2 U.S.C.M.A. 489, 9 C.M.R. 119 (1953); United States v. Perry, 10 C.M.R. 387 (1953). *But see* United States v. Daniels, 10 C.M.R. 918, 925 (1953).

[148] MANUAL FOR COURTS-MARTIAL, U.S., 1951, ¶164a at 314-15.

Conclusion

The discussion of proof of intent to avoid harzardous duty and shirk important service in the present Manual for Courts-Martial places undue emphasis on only a few of the factors from which such intent may be inferred while ignoring many others. For example, the Manual requires a showing that accused was "personally warned of the imminence of the duty" or that his organization was so warned "at a formation at which the roll was called and the accused was present."[148] Nothing so formal is required. It is enough that accused knew that the duty was imminent, even though such information was obtained through second-hand sources, and that with such knowledge he absented himself without other apparent reason knowing that the unauthorized absence would cause him to miss the duty. His knowledge of imminence may be obtained from such a formal warning as the Manual lists, or it may be obtained from observation of circumstances which import imminence of duty.

Moreover, the Manual's requirement that "there should be evidence of facts raising a reasonable inference that the accused knew with reasonable certainty that he would be required for such hazardous duty or important service" is not as all-embracing a necessity as its provisions would seem to require. Proof of intent to avoid duty may rest on accused's admissions or other actions which independently of imminent service permit a sound basis for deducing his intent. The factors mentioned in this article will serve as such a basis.

SENATORIAL REJECTIONS OF PRESIDENTIAL NOMINATIONS TO THE CABINET: A STUDY IN CONSTITUTIONAL CUSTOM

LOUIS C. JAMES*

INTRODUCTION

On June 19, 1959, *The Washington Post and Times Herald*[1] headlined the Senate's rejection of Lewis L. Strauss for Secretary of Commerce by a vote of 49 to 46. We are interested in the present rejection[2] only as a part of the larger question: when, if ever, should the Senate reject Presidential nominations to the Cabinet. In order to arrive at any conclusions in this matter, we shall review the several rejections up to Strauss. A few interesting observations on the origin and growth of the Cabinet[3] as a constitutional custom may first be in order.

THE CABINET

The "Founding Fathers" did not create a Cabinet[4] for the Chief Magistrate — the President. The Constitution speaks of heads of de-

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* See Contributors' Section, p. 263, for biographical data.

[1] The Washington Post and Times Herald, June 19, 1959, §A, p. 1.

[2] Lewis L. Strauss was rejected for the Cabinet position of Secretary of Commerce. *Ibid.* The writer is of the opinion that we are too close in point of time to the present rejection to be able to write objectively of the matter. Also, additional facts may possibly appear later that will give more facts as to the reasons for the rejection. Several interesting comments have been made by newspaper contributors as to the possible reasons why Strauss was rejected. See, Walter Lippmann, *The Strauss Affair*, The Washington Post and Times Herald, June 23, 1959, §A, p. 15; and David Lawrence, *Sad Chapter in the Senate*, The Evening Star, June 19, 1959, §A, p. 19.

[3] See for comments the following: CORWIN, THE PRESIDENT OFFICE AND POWERS: HISTORY AND ANALYSIS OF PRACTICE AND OPINION 80, 81, 301, 302, 304, 305, 320, 322, 446 (1941); 1 HOCKETT, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 1776-1826, 244 (1939); WILSON, CONGRESSIONAL GOVERNMENT 257 (1913); 1 BRYCE, THE AMERICAN COMMONWEALTH 86-96 (1895); 2 BRYCE, THE AMERICAN COMMONWEALTH 157 (1895); KELLY & HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 184, 185 (1948); SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 54, 55, 61-63, 147-148, 275, 378, 561-562 (1943); BEARD, THE ENDURING FEDERALIST 294, 321-28 (1948); HURST, THE GROWTH OF AMERICAN LAW; THE LAW MAKERS 379-81 (1950); MATHEWS, THE AMERICAN CONSTITUTIONAL SYSTEM 88, 131, 155 (1940); NORTON, THE CONSTITUTION OF THE UNITED STATES: ITS SOURCES AND ITS APPLICATION 112, 113 (1940); 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 135, 136, 158, 495, 499, 533, 541-543, 575, 599, 638, 659 (1937); 3 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 111, 606, 608 (1937); Muskrat v. United States, 219 U.S. 346 (1911); *In re* Neagle, 135 U.S. 1 (1890).

[4] *Ibid.*

partments, and of principal officers. From these officers the President may require, in writing,[5] opinions about any matter pertaining to their departments. The Constitution further gives the Chief Executive the power to nominate and appoint these principal officers by and with the advice and consent of the Senate.[6] The Senate, therefore, has a check on the President in his appointive power. The "Fathers" feared that unless this responsibility was laid equally upon the Senate and the President that a strong Chief Magistrate might appoint unworthy subordinates, and thereby obtain power contrary to the best interests of the people.[7]

The Cabinet in the United States grew up by a custom, which seems to have begun when President Washington, while making a southern tour of the nation, left instructions for the Vice President and the department heads to consult on routine matters and, if any emergency required his attention, they were to advise him by messenger. Gradually, over a period of time, it became customary for the President to call into conference the several departmental heads. These principal officers became an official family of the President. Loyalty, confidence, dispatch and character were major requirements for the position of department head.

It is well to remember that the Cabinet was born through custom, and that usage generally gives the President the right to choose and appoint whom he desires for his official family. As a rule, the Senate permits the Chief Magistrate's Cabinet nominations to be confirmed with little difficulty, because it has come to look upon the Cabinet as a part of the Executive, intimately connected, as an official family. The Senate retains the right of rejection, even if it is seldom used; and this body (the Senate) is its own judge of the meaning of the word "unfitness" as it applies to any Cabinet nominee.

However, it must not be forgotten that the Senate is co-jointly, with the President, responsible for each Cabinet appointment. The Senate, equally with the Executive, owes a duty to the people to see that worthy men are entrusted with the executive departments. This seems wise because it is to be presumed that the Senate, as well as the Chief Magistrate, acts in the best interest of the people. The power of this body (the Senate) over confirmations can do no harm if it is used wisely, but can, on the other hand, add valuable "sifting" power to appointments. Lastly, there have been comparatively few

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[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*

Senatorial rejections of Cabinet nominations; in fact, since 1789, there have been only eight[8] (including the Strauss rejection of recent date).

THE TANEY REJECTION

Roger Brooke Taney[9] assumed the duties of Secretary of the Treasury, through a recess appointment from President Andrew Jackson, on September 24, 1833. William J. Duane, who preceded him in that office, was dismissed by Jackson because he would not consent to remove the federal deposits from the Bank of the United States as desired by the President. Taney, upon his appointment, began to remove the government bank deposits in harmony with Jackson's wishes. The President sent his nomination to the Senate on June 23, 1834, and this body rejected it at once.[10] This was the first Senatorial rejection of a Presidential nomination to the Cabinet.[11]

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[8] The seven rejections (in addition to the recent Strauss rejection) may be listed as follows:

Nominee	*Position*	*President and Date*		*Vote*
Roger B. Taney	Sec. Treas.	Jackson	6-23-1834	18 to 28
Caleb Cushing	Sec. Treas.	Tyler	3- 3-1843	19 to 27
Caleb Cushing	Sec. Treas.	Tyler	3- 3-1843	10 to 27
Caleb Cushing	Sec. Treas.	Tyler	3- 3-1843	2 to 29
David Henshaw	Sec. Navy	Tyler	1-15-1844	6 to 34
James M. Porter	Sec. War	Tyler	1-30-1844	3 to 38
James S. Green	Sec. Treas.	Tyler	6-15-1844	not rec.
Henry Stanbery	Atty. General	Johnson	6- 2-1868	11 to 29
Charles B. Warren	Atty. General	Coolidge	3-10-1925	39 to 41
Charles B. Warren	Atty. General	Coolidge	3-16-1925	39 to 46

The above information was obtained from 2 HAYNES, THE SENATE OF THE UNITED STATES 761 (1938).

[9] Taney was educated at Dickinson College, Pennsylvania. He had been born into the "purple" of the landed gentry of Calvert, Maryland. His life was begun much as the other country gentlemen of his period and section. He was a Federalist but lived in the era of dying Federalism. When the War of 1812 was precipitated Taney divorced himself from the old-line Federalists and assisted in leading the fight for National unity, although he contended against the war spirit as long as the country was at peace. He was a lawyer and with the end of the war he devoted himself to active practice. From Frederick, Maryland, where he had practiced, he moved to Baltimore to more easily gain his fortune. From Frederick to Baltimore he left a trail of well-fought brilliant legal battles. Jackson learned, through a friend, that Taney was one of the Federalists who fought for the unity of the nation during the war. Taney gained the reputation for courtliness and culture in a section in which such manners were a matter of everyday life. In his legal work he was painstaking and once he thought a matter through he was a determined antagonist on principle. Like others of a later period, such as Robert E. Lee, duty became a watchword for him. Books, long tramps through the woods, poetry and his deep Catholic religious belief became of second nature to him. He was nervous but vehement in his views and all knew him to be uncompromising on principles. Such a man became the later crusader of the Jackson administration. The National Intelligencer, on October 14, 1834, stated that his unpardonable error seemed to have been his adherence to the Jacksonian creed of government. SWISHER, ROGER B. TANEY, 303-304 (1935).

[10] SENATE JOURNAL, 23RD CONG., 1ST SESS. 341.

[11] SWISHER, *op. cit. supra* note 9, at 286-287.

Why was Taney rejected? It is necessary to review many of the historical events from the date of Jackson's election up to the time of the rejection in order to determine the reasons for the Senate's adverseness to Taney.

In 1828 Andrew Jackson was elected to the Presidency. He was a friend of the "common man." This election was the dawn of a new era in American politics. Presidents had formerly been elected and policies determined, to some extent, by manipulations among politicians in the Congress. Property had swayed national elections through the restrictive franchise imposed for the protection of property holders. With the coming of manhood suffrage, however, many in the nation feared the vote of a propertyless mass. Indeed, the aristocracy now feared loss of its position as a favored class. The Jackson election signified the rising of the masses and the coming of democracy to the people "en masse."

Many people were shocked by Jackson's election. Officeholders and the wealthy-intellectual classes felt as if they had been affronted. Two-thirds of the newspapers, four-fifths of the ministers and seven-eighths of the banking interests opposed Jackson. He was thought of as the representative of a "rough, illiterate" mob.[12]

In 1816 the Bank of the United States had been chartered for twenty years. Jackson was a hard-money advocate. He feared the control of American currency by the Bank. This "monster" of finance, by virtue of its lending power, held American business within its grasp. It was a private corporation holding vast deposits of federal money, which it used in its operations. The few directors appointed by the government on the Bank's board had very little if any control over its policies. It was headed by a thoroughly unscrupulous individual named Nicholas Biddle. Under his direction, the Bank, not responsible to the people, became a key in the manipulations of the politics of the day. Jackson was determined to eliminate the Bank.

Henry Clay, a prominent national Republican leader, Senator from Kentucky and future Whig leader, hoped to be President in 1832. The Kentuckian embraced the principles of a protective tariff, internal improvements, a rechartered Bank of the United States and a firmly knit centralized government. He and Jackson were natural antagonists. Clay thought he had an opportunity to use the Bank's recharter as a political propaganda issue for his election to the Presidency. He would force Jackson's hand on this issue. At the same time, Daniel Webster, a national Republican Senator from Massachusetts, was on the Bank's payroll through retainer fees for his support

[12] BOWERS, THE PARTY BATTLES OF THE JACKSON PERIOD 31-63 (1923).

of its policies. He was a natural ally of Clay in the fight for the recharter of the Bank.

On January 9, 1832, petitions for recharter were presented in both Houses. A committee was now appointed in Congress to investigate the Bank. The majority report of the committee condemned the "monster". In May the fight began in earnest over the Bank's recharter, and shortly afterwards the bill was passed by the Senate and House.[13]

Taney, Attorney General of the United States, opposed the renewal President, listing his views as to why the recharter bill should be vetoed. On July 3rd the bill was received by President Jackson.

Van Buren, just returned from England, heard the President say: "The bank, Mr. Van Buren, is trying to kill me, but I will kill it."[14] Jackson read Taney's memorandum and heard arguments by members of the Cabinet on the recharter bill. The President was not willing to compromise on the Bank bill as some in the Cabinet thought should be done. Amos Kendall, Andrew J. Donelson, and Taney worked on the veto message. The message of the President, dated July 10, 1832, burst like a bombshell upon the nation. The core of it voiced the belief Jackson held in the common man when it stated:

> It is to be regretted, that the rich and powerful too often bend the acts of government to their selfish purposes. Distinctions in society will always exist under every just government. Equality of talents, of education, or of wealth cannot be produced by human institutions. In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions . . . to make the rich richer and the potent more powerful, the humble members of society — the farmers, mechanics, and laborers — who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government.[15]

Jackson's real case against the Bank, as well as Taney's, Benton's and Kendall's, rested on hard-money views. They believed that the paper system caused periodic depressions. Further, the Bank tended to build up an aristocracy, but Jackson and his cohorts could not use their hard-money views because such ideas would injure the administration with the debtor West and the state banks. Jackson argued, in his veto message, that he was opposed to the Bank because it was unconstitutional. Here he followed the strict constructionist views of

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[13] SCHLESINGER, THE AGE OF JACKSON 86-87 (1946).

[14] 2 AMERICAN HISTORICAL ASSOCIATION, ANNUAL REPORT FOR THE YEAR 1918, MARTIN VAN BUREN, AUTOBIOGRAPHY 625 (1918).

[15] 2 RICHARDSON, COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1907 at 590 (1908).

Jefferson. He also stated that the Bank represented too much concentration of power in the hands of a private corporation. Daniel Webster, in a survey of events, said that the poor were to be arrayed against the rich, and Jackson was to become the champion of the masses.

The Bank became a definite issue in the campaign of 1832 and in the election that followed. Jackson was supported by the electorate in this test of strength against Henry Clay, the proponent of a rechartered Bank.

John C. Calhoun, of South Carolina, joined in the battle against Jackson. He had been berated by Jackson over certain criticisms that were said to have come from Calhoun during the Seminole War.[16] Further, Jackson had fought Calhoun and the Nullificationists of South Carolina through his Force Bill when that state threatened nullification of the Tariff of Abominations. Clay had come to the rescue of Calhoun in this struggle, with his compromise tariff bill, and had thus endeared himself, to an extent, to the South Carolinian. Calhoun found himself with Clay and Webster in opposition to Jackson.

An election victory, and popular acclaim following the nullification crisis, made the administration the more determined to reduce the American aristocracy of which the Bank was an important element. What could be done to anticipate the Bank's dissolution in 1836, when its charter would expire? The government deposits could be removed. No aid was to be furnished to the vanquished Bank for recoupment which would enable it to prepare for another battle for recharter. Taney, Kendall, and Blair supported Jackson in his removal plan.

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[16] In March, 1831, Calhoun's pamphlet appeared trying to explain the reason for the antagonism between the President and himself. He placed the blame on Van Buren as the chief instigator of this friction. Calhoun seemed to think that it was a method of Van Buren's to destroy the "Logician" and make himself the apparent heir to the Presidency. The pamphlet was entitled, Correspondence between General Andrew Jackson and John C. Calhoun, President and Vice-President of the United States, on the Subject of the Course of the Latter in the Deliberations of the Cabinet of Mr. Monroe on the Occurrences of the Seminole War. It appears that Mr. Calhoun had authorized, in conjunction with Mr. Monroe, the movements of General Jackson in the Seminole War in Florida through instructions of such a general nature as to leave General Jackson to use his own initiative. After General Jackson had taken the peninsula of Florida, which he was permitted to do under the general authorization, there arose a contest in the Cabinet of Mr. Monroe as to whether Jackson should be brought to trial for exceeding his authority, or at least an inquiry be made on the matter. It was hinted that Mr. Crawford, who was a member of the Monroe Cabinet, was behind this move to hurt General Jackson. Only after Jackson had become President and Calhoun Vice-President did Jackson learn that Calhoun was the one who had fought him. During all of this time, Calhoun had led Jackson to believe that he was not the one who had fought him, but on the contrary that he had defended him. When Jackson learned the facts, he wrote the true statement of the entire situation in what he called an "Exposition" and terminated further correspondence with Calhoun. Here arose the terrible split in the Jackson Administration between the President and the Vice-President, which led Mr. Calhoun to fight the President and to throw his considerable strength against him. BENTON, THIRTY YEARS' VIEW 167-80 (1858).

The Bank was now fully aroused to its danger. What could it do to force Jackson to yield? Biddle decided he would thrust a panic upon the nation by calling in the notes held by the Bank, and by this means bring pressure to bear upon the President to retract. Businesses failed, many were unemployed, and money could not be obtained in the country because of the restriction of currency. Calhoun entered the battle against the administration. Clay spoke about the undermined currency, the recharter veto of the President, the destruction of internal improvements in the nation, and the danger that the tariff would be submerged under a rampant radicalism. Liberty and the Constitution were now visioned as in serious jeopardy by the concentration of power in the hands of one man.

On February 5th Taney's removals were censured by the Senate as unconstitutional. Jackson was charged with acting contrary to the Constitution. By degrees, however, the Bank's president, Nicholas Biddle, recognized the futility of the fight with a President who would not yield. Biddle began to expand credit through the Bank, and by June 1, 1835, the panic was over and the country was saved from chaos.

Roger Brooke Taney had been prominent in the battles of the Jackson administration against the Bank. He had espoused plans that were anathema to the leaders of the Senate. Mr. Taney believed that the interest of the nation required that public moneys should be withdrawn from the Bank of the United States, and when he came into office he gladly carried out the orders of Jackson.[17] From the Charter of the Bank in 1816, it appears that the Secretary of the Treasury had a right to remove the deposits.[18]

On June 23, 1834, in the 23rd Congress, Adams noted that: "The Senate this day rejected the nomination of . . . Roger B. Taney as Secretary of the Treasury — twenty-eight to eighteen."[19] The next day Taney retired from office. In the eyes of the nation it was made to appear that Taney was the prime mover in the withdrawals of the deposits. The Bank forces were set in their opinion that Taney must

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[17] WISE, SEVEN DECADES OF THE UNION 136 (1881).

[18] "An Act to incorporate the subscribers to the Bank of the United States, approved April 10, 1816" — "And be it further enacted, that the deposits of the money of the United States, in places the said bank and branches thereof may be established shall be made in said bank or branches thereof, unless the Secretary of the Treasury shall at any time otherwise order and direct; in which case the Secretary of the Treasury shall immediately lay before Congress, if in session, and if not, immediately after the commencement of the next session, the reason of such order or direction." Laws, U. S., 14th Congress, 1st Sess., §16, Ch. 44, 28-42.

[19] 9 CHARLES ADAMS, MEMOIRS OF JOHN QUINCY ADAMS 155 (1877).

be punished for his actions against the Bank through the refusal of his confirmation as Secretary of the Treasury. In their desire to serve the Bank, some members of the Senate had cried "Crucify him, crucify him."

"A presentment of what was to happen," wrote Thomas Hart Benton, "induced the President to delay, until near the end of the session, the nomination to the Senate of Mr. Taney for Secretary of the Treasury." He had offended the Bank of the United States too much to expect his confirmation in the present temper of the Senate.[20]

The newly elected House of Representatives in 1834, in a campaign in which the Bank had been thoroughly discussed, indicated that the people supported Jackson in his program. This impressed neither the Bank nor the Senate. The Upper House, dominated by anti-Jackson men, would be its own master.[21]

Later, after the nominee had been made Chief Justice of the Supreme Court, on the passing in 1835 of Chief Justice Marshall, Clay recanted his previous views of Taney. He went into the Chief Justice's office one day and shook hands with him, saying: ". . . I have witnessed your judicial career, and it is due to myself and due to you that I should say what has been the result; that I am satisfied now that no man in the United States could have been selected, more abundantly able to wear the ermine which Chief Justice Marshall honored."[22] Until his last days, Clay continued to hold this final conviction that Taney's life was ". . . a blessing to the country."[23]

It seems apparent that Roger Brooke Taney was rejected for the position of Secretary of the Treasury because of the battle between President Jackson and the Senate. His ability to fill the posititon could not be reasonably questioned. His integrity and honor were never the subject of dispute. He assisted Andrew Jackson against the Clay-Webster-Calhoun alliance in the Senate, for which, politically, he was doomed to suffer rejection of his nomination by the Senate. A Presidential-Senatorial strife, supplemented by dislike for the nominee as a leading Presidential actor, caused Taney's rejection.

Rejections of Cabinet Nominees: 1840-1844

On March 2, 1843, President John Tyler nominated Caleb Cush-

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[20] 1 Benton, *op. cit. supra* note 16, at 470.
[21] Samuel Tyler, Memoir of Roger Brooke Taney 213 (1872).
[22] 2 Warren, The Supreme Court in the United States History 16 (1937).
[23] *Ibid.*

ing,[24] of Massachusetts, to be Secretary of the Treasury.[25] The Senate refused to confirm the nominee by a vote of twenty-seven to nineteen.[26] Tyler returned the nomination which was a second time rejected by a vote of twenty-seven to ten.[27] The President was angered by the Senate's second refusal and immediately returned the nomination. Again Cushing was rejected by a vote, this time twenty-nine to two.

David Henshaw, Democratic boss from Massachusetts,[28] oppugnacious Whig opponent and friend of Mr. Tyler, was commissioned Secretary of the Navy on July 24, 1843, during a recess of the Senate. He entered upon his duties at once and was nominated by the President on December 6, 1843. He was a gruff, "candid and confident" man, said Arthur J. Schlesinger, Jr., who "aimed straight at his objectives and accomplished them with a minimum of moral scruple. His health was bad, and in later years the gout ruined an already unstable

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[24] Caleb Cushing was one of the most brilliant men of the nation in his day. The following listing of his activities will give some knowledge of his background: 1825 — Member of the Massachusetts Legislature; 1827 — Member of the Massachusetts Senate; also, 1833 — Member of the Massachusetts Senate; 1835 — Member of the National House of Representatives; 1843 — Commissioner to China; 1845 — Member of the Massachusetts Legislature; also, 1850 — Member of the Massachusetts Legislature; 1852 — Judge of the Supreme Court of Massachusetts; 1853 — Attorney General of the United States; 1866 — Member of the Commission to Codify the Laws of the United States; 1872 — United States Counsel at Geneva Tribunal and 1874 — Minister to Spain.

He had been educated at Harvard College, and he and Mr. Edward Everett were classed as the two greatest linguists ever to be seated in the Congress or in a President's Cabinet. Cushing was able to read and translate all of the languages of Europe and many of those of Asia. He graduated from college at the youthful age of seventeen, and was admitted to the bar in 1822; within a few years he was among the leaders of the Massachusetts Bar. W. H. SMITH, HISTORY OF THE CABINET OF THE UNITED STATES OF AMERICA 338-40 (1925).

[25] SENATE JOURNAL, 27TH CONG., 3RD SESS. p. 314.

[26] The Senate's votes on Mr. Cushing were yeas 19 — Bates, Buchanan, Calhoun, Choate, Cuthbert, Evans, Fulton, King, McDuffie, McRoberts, Rives, Servier, Sturgeon, Tallmadge, Walker, Wilcox, Williams, Woodbury, and Wright; nays 27 — Allen, Archer, Bagby, Barrow, Bayard, Benton, Berrien, Clayton, Conrad, Crafts, Crittenden, Graham, Henderson, Huntington, Kerr, Linn, Mangum, Merrick, Miller, Morehead, Phelps, Porter, Simmons, Smith (of Indiana), Sprague, Tappan, and White. SMITH, *op. cit. supra* note 24, at 315.

[27] The Senate's votes for Mr. Cushing were 10 — Bates, Calhoun, Cuthbert, Fulton, King, McDuffie, Rives, Servier, Sturgeon and Walker; against him 27 — Allen, Archer, Bagby, Barrow, Bayard, Benton, Berrien, Linn, Mangum, Merrick, Miller, Morehead, Porter, Simmons, Smith (of Indiana), Sprague, Tappen, White, and Woodbridge. SENATE JOURNAL, 27TH CONG., 3RD SESS. p. 316.

[28] David Henshaw was born in Leicester, Massachusetts, April 2, 1791. He was educated at Leicester Academy. In 1830 he was Collector of the Port of Boston, and Secretary of the Navy by appointment of Mr. Tyler in 1843. At the age of twenty-one he engaged in business for himself. He was a politician of no mean worth and a political writer. He was the Democratic boss of Massachusetts (the Whigs could not forget his strong opposition to them in the Boston area). In 1830 he retired from active business. He served several terms in both houses of the Legislature of his native state. He interested himself in railroad building and was largely instrumental in projecting several lines into Boston. SMITH, *op. cit. supra* note 24, at 406, 408, 420-421.

temper."[29] His name was rejected by the Senate on January 15th, although he continued to serve, by Presidential request, in his position until February 19th.[30] Mr. Henshaw was refused confirmation by a vote of thirty-four to six.[31]

James M. Porter, Democratic leader from Pennsylvania[32] and a friend of Tyler's, was commissioned during the recess of the Senate for Secretary of War. His nomination was sent to the Senate on December 6, 1843, and was later rejected by a vote of thirty-eight to three. Subsequently, James S. Green, of New Jersey,[33] was nominated by the President for Secretary of the Treasury and rejected by the Senate.[34]

Why were these men rejected? The Tyler administration in 1840 presented a unique situation. In order to comprehend the reasons for the Cabinet rejections in this period we must understand the man, Tyler, and the events leading up to his Presidency. John Tyler was at heart a Democrat even while serving, later on, as a Whig President.[35] He had been a Democrat until 1836, although at times he seemed quite independent of party regularity. The Virginian had his own ideals and was never afraid to fight for them.[36] In 1836 he broke the last link with the Democratic Party by opposing Senator Benton's expunging resolution in the Senate.[37] Tyler had approved Jackson's veto of the United States Bank recharter, but disapproved of Jackson's tendency towards centralization of the national government and his harsh threats

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[29] SCHLESINGER, *op. cit. supra* note 13, at 147.

[30] MOSHER, EXECUTIVE REGISTER OF THE UNITED STATES 1789-1902, at 130-33 (1905).

[31] 2 HAYNES, THE SENATE OF THE UNITED STATES 761 (1938) (votes not tabulated by name).

[32] James Madison Porter was born January 6, 1793, near Norristown, Pennsylvania. He received his early education at home and later attended Norristown Academy. He was preparing to enter college when the college building at Princeton was burned during a student rebellion. Thereafter, he continued his education in his father's library. In 1809 he took up the study of law, and was admitted to the bar in 1813. The year 1818 found him deputy attorney general for Northhampton County. Soon he occupied the first place at the bar. He was president of the board of trustees of Lafayette College from 1826 to 1852 and professor of jurisprudence and political economy from 1837 to 1852. In 1837-38 he was Democratic candidate for presiding officer of the State Constitutional Convention. In 1839 he was appointed presiding judge of the 12th judicial district. In 1843 President Tyler appointed him Secretary of War and in 1849 he was elected to the legislature. In 1863 he was elected president judge of the 22nd judicial district for a ten-year period. He was the first president of the Delaware, Lehigh, Schuylkill and Susquehanna Railroad which had been chartered in 1847. He was also president of the Belvidere Delaware Railroad and of several other corporations in Easton. 8 McMURRY, DICTIONARY OF AMERICAN BIOGRAPHY 94-95.

[33] No further information on this nominee seems available. SMITH, *op. cit. supra* note 24, at 170.

[34] MOSHER, *op. cit. supra* note 30; HAYNES, *op. cit. supra* note 31.

[35] CHITWOOD, JOHN TYLER 208 (1939).

[36] *Id.* at 27-28, 32-34, 102-105, 112-113, 132.

[37] This Resolution was to remove a censure of the Senate on ex-President Jackson while he was in the White House.

in the South Carolina nullification crisis. He was a Virginian of the extreme state-rights Jeffersonian school. Tyler and Henry Clay had little in common. Clay espoused his theories of a strong nation firmly knit together under protective tariff, internal improvements and a re-chartered Bank of the United States. Clay was a leader, in essence a practical director, of the National Republican party which later developed into the Whig Party. When the Whigs unfurled the Jefferson banner and announced opposition to the consolidation of power in Washington, Tyler felt that his place in politics had at last been chosen for him; he would join them.[38] Because of a political "deal" and the death of President Harrison, Tyler became President.[39]

No definite measures had been proposed by the Whigs in their campaign of 1840 except denunciation of Executive usurpation and patronage abuses in conjunction with "Log Cabin" and "Hard Cider" propaganda. However, Tyler, when he became President, found an unopened letter, sent by special messenger, from one of the political bosses of the Whig party, addressed to President Harrison. Governor William H. Seward, of New York, in this letter had requested Harrison to begin work immediately on plans for a National Bank, a protective tariff, and the distribution of the proceeds of the public lands to the States. Seward assumed that these three items would be on the Whig program, although not a single one of them had been an issue in the 1840 campaign.

Tyler in a speech on May 9, 1841, addressed to "The People of the United States" called for economy in government, elimination of patronage abuses, opposition to the independent treasury, and support for "any constitutional measure which, originating in Congress, shall have for its object the restoration of a sound circulating medium."[40]

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[38] FRASER, DEMOCRACY IN THE MAKING: THE JACKSON TYLER ERA 120-121 (1938).

[39] Even his decision to become a part of the Whig party might not have placed him in the White House if fate had not brought the opportunity. Henry Clay, a Whig leader "par excellence," expected to be the Whig candidate for President in 1840. He wanted the electoral vote of Virginia for the Whigs, and desired the votes of as many Southerners as possible. Who could better weld the Southern anti-Jackson votes into a unit than John Tyler as Vice-Presidential candidate on the Whig Ticket? Clay and the Whig, Henry A. Wise of Virginia, made a political deal, and out of it Tyler emerged as Vice-Presidential candidate of the Whig party. In the meantime, Clay as a possible Presidential candidate was discarded by his party in favor of a "Black-Horse" candidate, Harrison, who was more acceptable because he was a person without positive views. Harrison could more easily fit into the leadership of a party which was composed of many diverse elements. Harrison was elected President with Tyler as Vice President. The death of Harrison completed the play of destiny. However, Tyler did not realize that his veiws would not fit into the Whig Party, or perhaps he thought the Whigs would accept him with his ideas. He would oppose a renewed Bank of the United States. The Virgianian was against high protective tariff, and the assumption of state debts by the Nation. Andrew Jackson said that Tyler would be President in action, as well as in name. 1 POORE, PERLEY'S REMINISCENCES OF SIXTY YEARS IN THE NATIONAL METROPOLIS 255 (1886).

[40] FRASER, *op. cit. supra* note 38, at 162.

What was the meaning of these words? Did they indicate the re-establishment of the Bank of the United States? To anyone following the life and views of the President, this would not be the construction. However, some leaders of the Whigs seemed to be uncertain as to the exact meaning of the President's message. They were to learn that Mr. Tyler was a man of determination who sought to rule as he thought best for the nation; he would not be subjected to any Whig dictator of the Adams-Clay type..[41]

The Kentuckian now presented to the Senate his six-point party program. He gave notice to the world that he thought himself, and not Tyler, the head of the Whig administration. He would tolerate no interference from anyone, and demanded: (1) the repeal of the independent treasury act; (2) re-establishment of the National Bank; (3) a revision of the tariff in order that adequate revenue might be provided; (4) a temporary government loan; (5) distribution of the proceeds of the public lands by loans to the states; and, (6) a revised system of banking for the District of Columbia. Henry Clay was in the saddle and he would lead. He planned to crack the whip and Tyler must follow or be an outcast from his party.[42] Clay's primary aim was the re-establishment of the Bank of the United States.[43]

Tyler and Clay had been in agreement on the first proposal. The President signed the bill for the repeal of the Independent Treasury Act. Clay now proposed to re-establish the Bank of the United States. Would the states have to assent before branches of the Bank could be established within their boundaries? It was felt that the President would oppose any Bank bill that coerced the states. Most of the Democrats in the Senate would not agree to any form of a re-established Bank. They were afraid a compromise might secure the President's agreement and this was the one thing they did not desire. However, Clay privately boasted that "Tyler dares not resist. I will drive him before me."[44]

The Whigs were determined to pass their Bank bill and re-establish a National Bank. The intrigue deepened. John Minor Botts, a Whig Representative from Virginia, and an admirer of Clay as well as an Old Dominion neighbor of Tyler, went to the White House on July 24th. While talking to Tyler he held in his hand a piece of paper on which was written a crucial amendment. He informed the President that he believed this amendment would settle all the differ-

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[41] John Quincy Adams, ex-President, was one of the leaders of the Whigs in the House at this time.
[42] CHITWOOD, *op. cit. supra* note 35, at 213; FRASER, *op. cit. supra* note 38, at 171.
[43] FRASER, *op. cit. supra* note 38, at 170.
[44] *Id.* at 174-175.

ences that might exist on the Bank bill. The amendment would have authorized branches of the Bank in any state whose legislature, at the following session, did not expressly dissent. It provided that in those states in which the legislature did expressly dissent, Congress might authorize branch banks wherever the interest of the public might seem to require them.

The President had little faith in Botts. He told him that he could not approve the amendment and would veto any bill containing it. Botts kept the amendment and on July 27, 1841, Clay arose in the Senate with the identical amendment, now in the handwriting of the Secretary of the Treasury, Mr. Ewing, and stated that it would settle all the difficulties on the National Bank question. The amendment was carried; Clay was elated. Soon afterwards the Bank bill passed the Senate and the House.

On August 16, the President vetoed the bill, because he viewed it as a return of the former Bank of the United States, and this he would not sanction. Tyler told Congress that he had always held such a Bank to be unconstitutional. He said that when he was elected Vice President the public had full knowledge of his views on the Bank and that it had not been an issue in the campaign, nor in the state elections which had been held during the process of work on the bill. He thought that the proposed corporation was essentially an institution of local loans; this was a feature he must oppose. The President thought the states should be permitted to accept or reject Bank branches within their boundaries. The bill did not grant such rights to the states.

The Whig leaders were aggravated with the President because of his veto. Clay said little, as another bill was coming up, and he wanted to wait a while longer before he had an open rupture with Tyler. He was still unprepared for a war with the Chief Magistrate.

Representative Alexander H. H. Stuart, Whig from Virginia, was approached by James A. Pearce, Whig from Maryland, on August 16, 1841. He was asked to see the President at once on a proposed amendment to the vetoed Bank bill. This new amendment, or suggested revision, it was said, would appease the President and a new bill could be drafted accordingly. It was stated that the President's objection to the vetoed bill was that it provided for agencies dealing in local loans. It was felt that Tyler might agree to branch Banks in the states, even without the consent of the states, if such branches were not permitted to deal in local loans. Such an amendment had been drafted and Stuart was to take it to the President.

Stuart carried the revision to Tyler on the 16th, but the President thought the capital of the proposed Bank was too large, and said fifteen million dollars would be sufficient. He agreed that if

public exigencies required, Congress should have the right to increase the capital. Tyler also insisted that no branches should be established in any state if the laws of the state were against it. Stuart was requested by Tyler to take the bill, as agreed upon, to Webster for the final drafting of it. Webster was not at home when Stuart called upon him, so he proceeded to leave his card and went directly to the Whig caucus, where he told the members of the group what he had done. They were well pleased and accepted Stuart's presumed compromise. Further negotiations were to be made with the President. Thus, Tyler would be committed to a new Bank bill. Speed was to be the essence of the timing. With the President committed to a Bank of some kind, there would be additional facts upon which to base a public denunciation of him if he vetoed the bill when it was passed the second time by the Congress. Clay prepared to indict Tyler for treachery to the party, if he should veto the proposed bill. If the Cabinet could be brought to confirm the compromise of the President, the time would have arrived to accuse him of deception. Stuart seemed to be innocent during the entire affair. He apparently did not know of the Whig trickery behind the suggested plan, nor could he foresee that within ten days the Whigs would abandon the assumed compromise; that the President's own marginal amendment written on the intended bill would be ignored and that his objections to any form of local loans would be side-tracked. Even the Chief Magistrate's request to see a copy of the proposed bill before it was submitted to Congress was to be denied.

After the caucus of the Whigs, and at midnight on August 16th, a drunken mob descended on the White House. It gathered at Tenth Street and Pennsylvania Avenue and was determined to vent its anger on Tyler. The President was without defense except for a few weapons saved from the War of 1812, which were hanging on the walls of the White House. Hastily he armed all of the occupants of the mansion and prepared to defend the portals of the Presidency. The mob on seeing muzzles protruding from the windows withdrew and on a nearby hill burned the President in effigy. No one seemed to know who instigated the mob.

The newspapers of the nation, on the morning of August 17, 1841, carried flashing headlines "Veto, Veto." The Whigs swore to even the score with the President. *The New York American,* a Whig paper, claimed the President was simply an egoist, seeking to concentrate all power in his hands at the expense of the legislative branch of the government. But the Whigs held a strong majority in both Houses of Congress and they would do their duty as they saw it.

The Democratic press of the nation was overjoyed in its expressions of gratitude to the President. This, too, did not cause Tyler's

"stock" to rise with the Whig leaders. Frank Blair of the *Globe* and Andrew Jackson at the Hermitage were listed as supporters of Tyler; Calhoun had supported the President. Tyler, during this time, was trying to find some common meeting grounds with the Whig leaders.

The following night many high-ranking members of the Democratic Party in Congress came to the White House to thank the President for his veto. This angered the Whigs.

On August 19th Henry Clay was at the zenith of his power; he was magnetic. Clay viewed the Bank bill as the most important piece of legislation of the entire Whig program. He arose in the Senate and started to ridicule the President. He thought the Bank had been the great issue of the 1840 campaign. Clay was incorrect in this assumption, but he was determined to carry his pet measure at whatever cost to truth and veracity. Clay charged that Tyler was organizing a third party. He viewed those who supported the President as "a low, vulgar and profligate cabal." The Whigs were lashing themselves into a fury at Tyler. They alleged that he was committed to a new Bank bill. The basis of this assumption was stated to have been a verbal understanding between Tyler and his Cabinet.

The new Bank bill was reported in the House on August 20th. The difference between the two bills was negligible; the new one passed the House and was followed by Whig criticisms of the President as "that miserable wretch at the other end of the avenue." A few days later the Senate concurred in the decision of the House.

What would the President do? Tyler admitted at a Cabinet meeting that those who dared to support him would be marked men with the Whig leaders in the Congress. On August 29th, at a Cabinet meeting the President discussed his proposed veto of the second Bank bill. Tyler turned, on the eve of the second veto, to Congressman Caleb Cushing who was in constant attendance on the President on September 6th, 7th and 8th, presumably assisting him in the drafting of the veto.

On September 9th the President submitted his second veto. He would not approve of an old-fashioned Bank of the United States, even though it was disguised under the name "fiscal corporation". The Chief Magistrate stated that "the manner in which its stock is to be subscribed and held, the appointment of its directors and their powers and duties, the corporate powers . . . show that it cannot be regarded as other than a Bank of the United States." The President said no private bank should operate on the credit of the Federal Government. The duty of regulating the value of money should not be combined with private gain to anyone through inflation and deflation of the nation's money by loans to corporations and private persons.

The Whigs were enraged. The President had dared once more to defy them. Botts in the House compared the President to a pig and to Benedict Arnold. Clay insisted that the President should be repudiated at once. The Massachusetts delegation in Congress supported Webster's intention to remain in the Cabinet.

On September 11th Ewing, Crittenden, Badger, and Bell, members of Tyler's Cabinet, sent in their resignations. The Whigs in Congress presumed that the President would not be able to form another Cabinet before the adjournment of Congress on the thirteenth. At that time it was believed that the President must nominate and the Senate confirm all nominees filling vacancies that were created while the Congress was in session. No recess appointments could be made, it was surmised, in such a contingency. Therefore, it was hoped that Tyler would be forced to resign. Should this happen, Samuel L. Southard of New Jersey, president pro-tempore of the Senate and a loyal Whig, would occupy the White House.

The President seemed to have anticipated the Whig strategy. A new Cabinet of very prominent men, who had not incurred the hostility of the Whigs on the Bank issue, was confirmed, partly for this reason and partly because the Congressmen were in a hurry to adjourn and go home.

On the night of the adjournment, the Whig members of Congress in caucus read Tyler out of the party. They served notice on him that if he could obstruct them, they would block his administration in the future. This was no idle threat. The President had refused to sign only two measures presented to him at that time, but these two measures were viewed as the major points of the Whig program.. The break between the President and his party had come in all of its finality.

The fight continued between Tyler and the Whigs and on January 11, 1843, an unsuccessful attempt was made to impeach the President. This was the first attempt of impeachment of a Chief Magistrate in American history.[45] Finally, the Whigs came to the conclusion that there was nothing they could do but wait until 1844 and then try to elect Clay as President. In the meantime they would obstruct, molest and hinder the administration in any manner possible. The smoke of one battle had scarcely cleared when another fight was precipitated. Politically, it was unfortunate for anyone to be an intimate of, or even friendly with, the President.

Tyler now tried to secure support from outside his political organization. He attempted to form a party with no success, after which

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[45] *Id.* at 282-86.

he turned to the Democrats and tried to obtain an alliance with them. The Democrats aided him only when it was to their interest; often they stayed on the sidelines and watched the fire of internal discord among their opponents.

Several pertinent reasons seem apparent for the rejections of the Cabinet nominees in the Tyler administration. Caleb Cushing was unsuccessful because the Whig leaders viewed him as a recreant Whig, a deserter of his associates, a turncoat and friend of the President. Formerly he had been a Whig leader in Congress. From a loyal party man, he became an intimate of the President and an aider and abetter in the Chief Magistrate's vetoes of the pet measure of the party, the re-establishment of the Bank of the United States.[46]

David Henshaw was also refused confirmation by the Senate. He had been a pugnacious Democratic boss of Massachusetts with few moral scruples, and disliked by the Whigs. It was hardly conceivable that a Whig-dominated Senate would look favorably on the appointment of a state Democratic boss of the Henshaw type in their administration; unless, as was the case of the later appointment and confirmation of John C. Calhoun as Secretary of State, such a leader had been a member of the Senate. Henshaw was deemed a friend of the President.[47]

James Madison Porter, of Pennsylvania, was a democratic leader and a friend of Tyler. Much of what has been said in regard to Mr. Henshaw may be stated as the reason for the Senatorial rejection of Mr. Porter,[48] and Mr. Green of New Jersey.[49]

In conclusion, it may be stated, with little fear of contradiction, that Presidential-Senatorial oppugnation, supplemented by dislike of the nominees caused the refusal of four of Tyler's candidates for Cabinet positions.[50]

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[46] SCHLESINGER, *op. cit. supra* note 13, at 245-246, 394-434; 4 SCHOULER, HISTORY OF THE UNITED STATES OF AMERICA UNDER THE CONSTITUTION 432-433, 439, 454 (1889); 2 SARGENT, PUBLIC MEN AND EVENTS 174 (1875); RRASER, *op. cit. supra* note 38, at 282; NEVINS, THE DIARY OF PHILIP HONE 552 (1936); WISE, SEVEN DECADES OF THE UNION 177 (1881); NILES NATIONAL REGISTER, Vol. LXIV, 307; *Id.* at Vol. LXV, 353.

[47] SCHLESINGER, *op. cit. supra* note 13, at 245-246, 394-434; SCHOULER, *op. cit. supra* note 46; NILES NATIONAL REGISTER, July 15, 1843, Vol. LXIV, 307; WISE, *op. cit. supra* note 46, at 213; 2 TYLER, THE LETTERS AND TIMES OF THE TYLERS 389, 283-89 (1884-1896).

[48] BURGESS, THE MIDDLE PERIOD: 1817-1858, at 286-287 (1905); HAYNES, *op. cit. supra* note 31, at 762; WISE, *op. cit. supra* note 17; NILES NATIONAL REGISTER, *op. cit. supra* note 46; CHITWOOD, *op. cit. supra* note 35, at 283-89.

[49] HAYNES, *op. cit. supra* note 30; WISE, *op. cit. supra* note 46; NILES NATIONAL REGISTER, *op. cit. supra* note 46; CHITWOOD, *op. cit. supra* note 35; 2 BENTON, THIRTY YEARS' VIEW 629 (1858).

[50] SCHLESINGER, *op. cit. supra* note 13; BEARD, THE RISE OF AMERICAN CIVILIZATION 572-79 (1946); MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 498-499 (1935); WISE, *op. cit. supra* note 46; 3 TYLER, THE LETTERS AND TIMES OF THE TYLERS 190 (1884-1896); 2 BENTON, *op. cit. supra* note 49, at 629.

The Stanbery Rejection

Henry Stanbery, of Ohio, was nominated as Attorney General of the United States on July 20, 1866, and confirmed and commissioned on July 23rd. His resignation was accepted as of March 11, 1868.[51] The relinquishment of his office was brought about by his over-sensitive nature in regard to the ethics of a situation in which he was serving both as Attorney General and as an attorney in the defense of President Andrew Johnson in the impeachment trial.[52] After the termination of the trial he was renominated for his old position, but was rejected by the Senate a few days later.[53]

Why did the Senate refuse to confirm Stanbery? The story goes back to the days of Lincoln and his policies for reconstruction of the Southland, whenever the war should cease. The program of Johnson was, in some respects, similar to that of Lincoln. It would appear that the attempted impeachment of the President was the result of a struggle between the executive and legislative divisions of the government over the plan of reconstruction. Lincoln had friction with Congressional leaders on his theory. If Lincoln, with all of his prestige in the winning of the war, had difficulty with Congress over a policy of what to do with the Southern states, how much more likely was Johnson to have opposition; he was not a Lincoln.[54]

Andrew Johnson, born at Raleigh, North Carolina, on December 29, 1808, was a self-made man. He was of humble though dignified birth, and because of the death of his father he was orphaned when he was five years of age.[55] Johnson, who started as an apprentice to a tailor, moved ever upward in the world from an unlettered, unschooled, harum-scarum boy, unable to read and write, to Alderman of his adopted town of Greenville, Tennessee. Then he became Tennessee State Senator in 1835, Congressman in 1843, Governor of his state in 1853, and a United States Senator in 1857.[56] He was a Democrat until 1864, when policy, to swing the Northern Democrats behind the Lincoln ticket, dictated his nomination as Vice President on the Republican ticket. The country knew his ideas on government; he was always a Democrat at heart.

Johnson had certain principles of government for which he was never afraid to fight, and with indomitable courage he sustained as best he could these ideals. He was against government extravagances, protective tariffs, nullification, and secession. Likewise, he advocated the annexation of Texas, supported the war with Mexico, believed in

[51] Mosher, *op. cit. supra* note 30, at 178.
[52] 3 Diary of Gideon Welles 311 (1911); Chadsey, The Struggle Between President Johnson and Congress Over Reconstruction 140 (1896).
[53] Mosher, *op. cit. supra* note 30.
[54] Dewitt, The Impeachment and Trial of Andrew Johnson 1-5 (1903).
[55] Savage, The Life and Public Services of Andrew Johnson 13 (1866).
[56] *Id.* at 13-50.

religious freedom, defended Andrew Jackson in his principles of government, fought always for the laboring classes, supported States' Rights, and recognized slavery as an existing institution. He believed that the Union should not interfere with the Negro's status, but in any contest over slavery the will of the nation should be supreme. The states had no right to secede, and when they tried to do so he considered their acts of secession null and void.[57] He was a man of strong will, self-determination, biased and prejudiced on certain occasions, and as stubborn as a Tennessee mule.[58]

We can well imagine what would happen when Johnson with his ideas, will, and determination should sit in the President's chair, when in the House and Senate there should be an overwhelming majority of members with ideas, in many cases, just the reverse of those held by the President, and determined to subject the South to Republican control.[59]

Thaddeus Stevens, member of the House from Pennsylvania, was the whip in the fight to reduce the South to a conquered province of the national government, subservient to the wishes of the Congress in any and all matters.[60] Johnson would punish the leaders of the Confederacy and make them sue for pardon for their traitorous acts, but he would not use the same harsh tactics on the great masses of the South, nor would he sanction wholesale confiscation of property in the South for the benefit of the loyal men and the freedmen. He would be lenient and seek to restore, as quickly as possible, the States to their proper place within the Union, which their governments had disrupted for a session.[61]

But his views led him to antagonize Congress. He was not a man of tact and discretion. In the campaign of 1866, in what is known as "the swing around the circle," he made speeches indiscreetly referring to Members of Congress who opposed him. Johnson exhibited anger in some of these appeals that caused him to lose prestige as Chief Magistrate of the nation. The President branded the leaders of the Republican Party as opposed to and seeking to destroy the fundamental principles of government. He listed Stevens, Sumner and Wendell Phillips as leaders in this movement. Johnson even characterized these leaders of the Republican Party as proponents of a new rebellion and, in an analogy with Jefferson Davis, trying to ruin the Union. He again antagonized the Republican Congress

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[57] *Id.* at 13-262.

[58] *Id.* at 342; CHADSEY, *op. cit. supra* note 52, at 8-10, 128.

[59] CHADSEY, *op. cit. supra* note 52, at 8, 10, 12, 17-27, 29-34, 49, 51-58; *Congressional Globe*, 39TH CONG., 1ST SESS. 147, 150, 155, 1169, 2256; DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION AND RELATED TOPICS 99 (1898).

[60] CHADSEY, *op. cit. supra* note 52, at 24-27; 3 DIARY OF GIDEON WELLES, *op. cit. supra* note 52, at 314; DUNNING, *op. cit. supra* note 59, at 107-108.

[61] CHADSEY, *op. cit. supra* note 52, at 1-60.

by his opposition to the Fourteenth Amendment.[62] Because of the disagreement with him on this Amendment, disaffection arose in his Cabinet. In 1866, William Dennison, Postmaster General, resigned on July 11th, James Speed, Attorney General on July 18th, and a few days later James Harlan, Secretary of the Interior. His numerous vetoes of bills, such as the Freedmen's Bureau Bill[63] and the Civil Rights Bill[64] antagonized an already wrought-up Congress which was edging further and further toward the views of the radicals of the Steven's type. The mid-term elections gave an overwhelming majority to Johnson's opponents in Congress. On February 7th, he addressed a delegation of colored representatives, from fifteen states and the District of Columbia, in which he held that emancipation was only an incident to the war to preserve the Union and that the war had not been waged to suppress slavery. In this speech he injured himself not only with Congress but with the humanitarians of the North. He said that the States must decide for themselves on the question of franchise. In his veto message to the Civil Rights Bill he doubted whether the Negro had the qualifications for citizenship.[65] He became in essence a man without a party. To add to the other grievances against him he used federal patronage as a means of opposition to those who fought him.[66]

Chadsey states that:

> We can thus easily distinguish three causes which, working together upon a strongly Republican Congress, resulted in the attempted removal of the President. First, the antagonisms arising from different fundamental political ideas, the strained conditions of the times, and the woeful tactlessness of Johnson; second, the almost morbid yet natural fears of the Republican party regarding the sometime seceded States; third, the anger aroused by the use of federal patronage to further the interests of the President.[67]

The attempt to impeach Johnson degenerated into a personal warfare. Several attempts to impeach without definite legal charges had failed. Could those who desired impeachment succeed by legislative limitation of the powers of the President?[68] They planned to try it.

The attack upon the civil powers of the Chief Magistrate was made through the Tenure-of-Office Act. It was stated that the Senate must advise and consent to removals of those civil officials on

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[62] *Id.* at 68, 84-86, 95-99.
[63] *Id.* at 65, 87-88.
[64] *Id.* at 71; *Congressional Globe*, 39TH CONG., 1ST SESS. 1679-81.
[65] CHADSEY, *op. cit. supra* note 52, at 65-66, 71; *Congressional Globe*, 39TH CONG., 1ST SESS. 1679-81.
[66] CHADSEY, *op. cit. supra* note 52, at 68, 128.
[67] *Id.* at 128.
[68] *Id.* at 130-33.

which they concurred in the appointment. If the President failed to honor this law he would be subject to impeachment, by the wording of the act, for "high crimes and misdemeanors in office". The President promptly vetoed the bill and it was just as promptly passed over his veto.[69]

Secretary of War Stanton favored the Congressional view of Reconstruction and opposed the President. He had become obnoxious to the Chief Magistrate. On August 12, 1867, the President suspended Stanton and appointed Grant as Secretary of War *ad interim*. The Senate refused to concur in this matter. Grant walked out on the President. On February 21, 1868, Johnson wrote to Stanton removing him from office. This was a match to the fuse and now the Congress thought it had the necessary material on which to base an impeachment. Finally the resolution formally impeaching the President of "high crimes and misdemeanors in office" was passed by the House of Representatives. In March the articles of impeachment were presented to the Senate and the trial began.[70]

From the beginning of the trial it was clearly seen that the case would be determined mainly on political grounds. The prosecution was practically brought to a close on May 16, 1868, by a vote taken in the Senate of the Eleventh Article of impeachment. Seven Republicans and twelve Democrats voted for acquittal. Thirty-five Republicans voted guilty; Johnson's opponents lacked one vote for a conviction, which required a two-thirds majority. By May 26th the impeachment had failed entirely and the trial was closed.

On the conclusion of the trial the President renominated Stanbery for his old position as Attorney General of the United States. Would the Senate approve the nomination of a man who had figured so prominently in the acquittal of Johnson? It was not likely that Stanbery would be confirmed.

No one could criticise the nominee's ability, honesty of purpose or moral fiber, as his character was above reproach. Certain conclusions can now be arrived at in the Stanbery case. First, one must not forget the Congressional-Presidential feud over Reconstruction. Many of the members of Congress literally hated the Chief Magistrate, and Johnson disliked many members of the Congress. Second, one must remember the important part that Stanbery had played as counsel for the impeached President. He was a king pin at the trial in which Johnson was victorious. It was not probable that the Congress could soon forget this drama.

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[69] *Id.* at 134-36.
[70] *Id.* at 136-39.

Gideon Welles, writing in his *Diary* under the date of June 3, 1868, states that "The Senate in its spite, has rejected the nomination of Mr. Stanbery as Attorney-General. There is in this rejection a factious and partisan exhibition by Senators which all good men must regret to witness."[71]

Robert W. Winston, in his admirable work, *Andrew Johnson,* states that Stanbery was ". . . ungraciously rejected by the Senate."[72] Lloyd Paul Stryker, in his work *Andrew Johnson,* finds much the same picture in stating that the Senate derived satisfaction in being able to reject Johnson's leading attorney in the impeachment trial when he was renominated for his old position.[73]

It is, indeed, a sad commentary on public affairs in the nation, as George Fort Milton states in *The Age of Hate,* that ". . . the Senate, still smarting under the defeat of the impeachment trial, pettily rejected him (Stanbery) as a fitting rebuke for his having appeared as counsel for 'the great criminal'."[74]

In conclusion, therefore, it is reasonable to say that the Senatorial-Presidential battle over Reconstruction supplemented by Senatorial dislike for the nominee caused Stanbery's rejection for the position of Attorney General of the United States.

The Warren Rejection

Charles Beecher Warren, of Michigan, was nominated for the position of Attorney General of the United States by President Calvin Coolidge on January 10, 1925.[75] His name did not come up for a Senatorial confirmation during the term of Congress then in session, because it was admitted by administration leaders that it would delay other necessary legislation that must be passed upon.[76] On March 5th President Coolidge again submitted the nomination of Mr. Warren;[77] and he was rejected March 10th by a surprise vote of 39 to 41,[78]

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[71] 3 Diary of Gideon Welles, *op. cit. supra* note 52, at 375.
[72] Winston, Andrew Johnson 454 (1928).
[73] Stryker, Andrew Johnson 735 (1930).
[74] Milton, The Age of Hate 634 (1930).
[75] Cong. Rec. Vol. LXVI, Part 2, 68th Cong., 2nd Sess. 1615; Hart, A Month's World History: Events in the United States, in 21 Current History 753 (1925).
[76] N. Y. Times, March 1, 1925, Vol. LXXIV, No. 24, 508, p. 6.
[77] Cong. Rec. Vol. LXVII, Part 1, 69th Cong., 10.
[78] The vote against confirmation included the following: Democrats 30 — Ashurst, Bayard, Blease, Bratton, Broussard, Bruce, Caraway, Copeland, Ferris, Fletcher, George, Harris, Harrison, Heflin, King, McKellar, Mayfield, Neely, Pittman, Ralston, Tansdell, Reed (Mo.), Robinson, Sheppard, Simmons, Swanson, Trammell, Tyson, Walsh, and Wheeler (Senator Overman of North Carolina, who first voted for Warren's confirmation in the tie ballot of 40-40, changed his vote on reconsideration, thus, casting the 31st Democratic vote against the confirmation); Insurgent Republicans 6 — Borah, Johnson (of California), McMaster, Norbeck, Norris and Couzens; Radical Republicans 3 — Brookhart, Frazier, and Ladd; Farmer-Laborite 1 — Ship-

while the Vice President was in a hotel taking a nap.

On March 16th the name of Mr. Warren, again having been presented to the Senate by the President, was rejected by a vote of 39 to 46.[79] The President stated that he would give Warren a recess appointment, but the nominee would not accede to the wishes of Coolidge.

It would be impossible to get the proper perspective of the Warren struggle for confirmation without a glance at the Harding era, the scandals in his Cabinet, and the growth of certain blocs in Congress.

In the Republican Party of this era there were certain "free lances" or "insurgents" who voted with the Party at elections, but were independent of Party regularity in the interim between elections. In this group could be listed Borah, Couzens, Johnson of California, McMaster, Norbeck, and Norris. Supplementing this group were the Farmer-Laborites, who also voted independently, and the Republican "Radicals," LaFollette, Ladd, Brookhart and Frazier. These "Radicals" were not "regular" in the election of 1924 because they had bolted the party to follow the Third Party leadership of Senator Robert M. LaFollette of Wisconsin. By this action they gained the name "Radical."

During this era the "Insurgents," the "Radicals," and the Farmer-Laborites had frequently added their votes to the Democrats to control the Senate. This alliance worked devastation on the "Old Guard Regulars" and any program opposed by the blocs. In fact, this association controlled Congress by virtue of its votes in the Senate.

Under President Harding, the Senate had approved Fall as Secretary of the Interior, Denby as Secretary of the Navy, and Daugherty as Attorney General. The oil scandals that later descended upon

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stead. Those voting for confirmation may be listed as following: Republicans 39 — Bingham, Butler, Cameron, Capper, Cummins, Curtis, Dale, Deneen, Du Pont, Ernst, Fernald, Fess, Gillett, Goff, Gooding, Hale, Harreld, Jones (Wash.), Keys, McKinley, McLean, McNary, Means, Metcalf, Moses, Oddie, Pepper, Pine, Reed (Pa.), Sackett, Schall, Shortridge, Smoot, Spencer, Stanfield, Wadsworth, Watson, Weller, and Willis. CONG. REC., Vol. LXVII, Part 1, 69TH CONG. 101; N. Y. Times, March 11, 1925, Vol. LXXIV, No. 24, 518, p. 1.

[79] Those voting for confirmation were as follows: Republicans 39 — Bingham, Butler, Cameron, Capper, Cummins, Curtis, Dale, Deneen, Du Pont, Ernst, Fernald, Fess, Gillett, Goff, Gooding, Hale, Herreld, Jones (Wash.), Keys, Lenroot, McKinley, McLean, McNary, Means, Metcalf, Moses, Oddie, Pepper, Pine, Sackett, Schall, Shortridge, Smoot, Spencer, Stanfield, Wadsworth, Watson, Weller, and Willis. Those voting against confirmation were the following: Democrats 35 — Ashurst, Bayard, Blease, Bratton, Broussard, Bruce, Caraway, Copeland, Gill, Edwards, Ferris, Fletcher, George, Gerry, Glass, Harris, Harrison, Heflin, Kendrick, King, McKellar, Mayfield, Neely, Ralston, Ransdell, Reed (Mo.), Robinson, Sheppard, Simmons, Smith, Swanson, Trammell, Tyson, Walsh (Montana), Wheeler; Republican Insurgents 6 — Borah, Couzens, Howell, Johnson (Calif.), Norbeck, and Norris; Radical Republicans 4 — Brookhart, Frazier, Ladd, LaFollette; Farmer-Laborite 1 — Shipstead. CONG. REC. *op. cit. supra* note 78, at 275; N. Y. Times, March 17, 1925, No. 24, 524, p. 1; 21 CURRENT HISTORY, *op. cit. supra* note 75, at 281.

the nation, forced Denby, a Harding holdover in the Coolidge administration, to retire under a cloud, at least of ignorance and carelessness, in the naval oil leases. Later Fall was convicted for bribery in leasing naval oil reserves to E. L. Doheny, Harry F. Sinclair and others. Daugherty was asked to resign because of the smell of scandal that attached to his failure to prosecute what seemed to be excellent cases against his friends of the Cabinet and others connected with the oil frauds against the Government. The Senate could not forget that it had confirmed these men. Should it not be more careful in the future to see that such men did not again obtain public office? President Coolidge also had antagonized the Senate leaders when he was requested to force the resignation of Denby; he told that body that this was a Presidential matter over which the Senate had no control.

Coolidge, as President, was beset by other troubles. The "regular" Republicans thought that it was time to teach the radical "bolters" that it was the best policy to be "regular" in the future. Consequently, LaFollette, Ladd, Brookhart and Frazier, the bolting radicals were read out of the party by demotions on committees. They would have to come back the hard way by service to the party before they would again be taken into the ranks of the "regulars."

With this picture in mind, we now turn to the nomination of Charles Beecher Warren for the position of Attorney General of the United States.

On January 6th, the Michigan delegation in Congress, on learning that Warren was being considered for the position of Attorney General of the United States, determined to protest to President Coolidge.[80] This delegation in the Congress opposed Warren because they wished to see their thrice elected Governor, Alexander J. Groesbeck, appointed to the position. Warren did not form a part of the Groesbeck organization in the state, and the members of Congress from Michigan did not approve of President Coolidge appointing a man out of step with the Governor's "machine." Besides, some thought it was only courteous for the President to consult the Senators of his party from a nominee's state for their endorsement of him. This custom had been less rigorously applied in Cabinet nominations because the appointment of the official advisors of the President was looked upon as a Presidential right. Nevertheless, such usage was agreeable to the Senate. During the preceding election, Mr. Coolidge had not endeared himself to the members of the Michigan Republican organization when he asked, without their consultation,[81] that Warren be appointed as

[80] 21 CURRENT HISTORY, *op. cit. supra* note 75.

[81] N. Y. Times, Vol. LXXIV, January 7, 1925, No. 24, 455, *"Against Warren Succeeding Stone: Michigan Delegation Hearing He Is to be Attorney General, Will Protest to Coolidge"*, 3; Shaw, *Warren For the Department of Justice*, 71, The American Review of Reviews No. 2, 123 (1925).

Chairman of the Committee on Resolutions of the Cleveland National Republican Convention.

Senator Walsh, Democrat of Montana, lead the fight against the confirmation of the nominee. In addressing the Senate he said:

> Mr. President, I subscribe to the doctrine that under all ordinary circumstances the nominations of the President of the United States for members of the Cabinet should be confirmed by the Senate without delay and that opposition of a political or factional character ought to be discountnanced. The President is charged by the Constitution to take care that the laws be faithfully executed, and he ought to be given the greatest liberty possible in the selection of those who immediately under him are to carry out his policies in accordance with the laws of Congress. Nevertheless, the founders of our Government, the framers of our Constitution, deemed it unwise to trust unrestrictedly to any one man the appointment of any of the principal officers of the Government, and accordingly provided that in the case of all nominations made by the President of the United States confirmation by the Senate should be necessary except in the case of such inferior officers as Congress might provide should be appointed by the President alone, by the courts, or by the heads of departments. The responsibility, accordingly, for the appointment of all Federal Officers whose confirmation is necessary rests upon this body jointly with the President of the United States. Whether equally or in lesser degree it is unnecessary to canvass. It is indisputable that we share that responsibility and that we must assume it, at least in part.[82]

Walsh continued that:

> All will agree that if a nominee, even for a Cabinet position, is lacking in moral character, he should be rejected by the Senate; but it is contended by some that otherwise his confirmation should follow as a matter of course. I can not think so. A man may have some serious blemishes in that matter of his private character and still be an able administrator and a courageous and patriotic official. Instances of that character will readily occur to any student of history. On the other hand, a man may have led the most exemplary life and yet be totally unfit for the duties and responsibilities of high official position. It is unwise, even if it were possible, accordingly, to attempt to lay down any general rule which ought to govern the Senate in its actions upon nominations for public office.[83]

Senator Walsh argued that in the case of Mr. Warren there must be a departure from the general rule because of the particular circumstances involved.

The Montana Senator stated that twice within the past few years the office of Attorney General had been filled, as in the case of War-

[82] See CONG. REC. 69TH CONG., Vol. LXVII, pp. 18-19, 31-32, 74-75, 83-84, 254-58, for arguments in the Warren Case.
[83] *Ibid.*

ren, by nominees who were appointed to the position not as a reward for eminent services in the legal profession but as a reward for actual services rendered in politics to the party. He said that in one case, apparently with reference to Attorney General Daugherty, the results had not been favorable. He thought, therefore, that we must judge the future by what had happened in the past.

The Senator from Montana continued his attack. He stated that Mr. Warren had indifferent legal experience in the practice of law since his life had been devoted to private business, largely in dealing with sugar. Even the clerks of the United States Supreme Court could not remember his face. It would appear, by inference, stated Walsh, that if he were a prominent attorney he would certainly have been known by members of the Court.

Walsh contended that the Attorney General should not only be eminent in his profession but should have no blemishes upon his character or his past record in matters that would reflect upon his reputation and fair dealings with the public. Could Warren be placed in a category of this nature? He said that he thought not in regard to his ability as an attorney and in his business connections which were of such a nature as to affect public confidence in his fairness as Attorney General in specific matters that might come before him. He referred here to the connections of Warren from the beginning of the present century.[84]

Walsh concluded that Warren might not proceed with fairness, if appointed Attorney General, in any suit that could arise concerning Sugar Trust matters. If the Michigan Sugar Company should be prosecuted by the Government, what position and what action could be expected from Warren as Attorney General?

Walsh further showed that other trusts were under investigation, among which was the notable example of Andrew Mellon's former Com-

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[84] For years Mr. Warren had been a representative in the State of Michigan of the Sugar Trust, which had been termed one of the most offensive and oppressive trusts in the entire nation. This organization had attempted to monopolize the supply of sugar of the American public. The Sugar Trust had gotten control of the Atlantic Coast refineries, and had manipulated the stock of the independent beet-sugar companies of Michigan in an attempt to get control of the sugar business in its entirety. At the turn of the present century it had become the controlling factor in the beet-sugar business of the country. Mr. Warren had acted as its agent in these deals, buying stock in his name and holding it in a fiduciary relationship for the Sugar Trust. In the manipulations of stock the Michigan Sugar Company had been formed with Warren as its president. He had remained the executive of this company until January 25, 1925, when he had resigned apparently to be in a position to accept the nomination for Attorney Generalship. In 1910 the Government of the United States had filed suit against the Sugar Trust, the Michigan Sugar Company and Mr. Warren. Under the Sherman Anti-Trust laws the Sugar Trust had finally been dissolved for restraining trade. In 1925, said Walsh, the Michigan Sugar Company had been charged by the Federal Trade Commission with being engaged in another conspiracy to restrain the trade of this nation.

pany, the Aluminum Company of America. Andrew Mellon was Secretary of the Treasury and a friend of Mr. Warren. What would Warren, if Attorney General, do if he were confronted with a required prosecution of the Aluminum Company of America?

The Montana Senator said that to confirm Warren would in essence mean that the Sherman Anti-Trust Act would be suspended while Warren was in office and that monopoly would run riot in this country.[85]

Senator Cummins, Republican of Iowa, was Warren's leading proponent. He had known the nominee for more than twenty years and had found him a capable and moral citizen. Warren had previously been confirmed by the Senate as ambassador to Japan and to Mexico, in which positions he had rendered meritorious service. These confirmations had been made since the Sugar Trust dissolution suit of 1910. He had represented the Government with a marked legal capacity in two international arbitration cases. Since Walsh had stated that he would vote for Warren's confirmation for any position other than that of Attorney General, it appeared strange that the nominee's character was good for any position other than this one. Cummins stated that the arguments of Walsh were unsound. There was no logic in a statement that a lawyer could defend only one set of interests forever. The real issue involved would amuse any man. It was that some time in the future a case "might" arise that "might" call for Warren's prosecution and he "might" not perform his duty because of former connections. Warren had conducted himself well on every occasion of his employment by the Government. Facts and not hypothecations should govern the minds of men.

Mr. Cummins believed that the President should have free choice in the selections of his Cabinet and that he should be held accountable for his nominees. All that could possibly be required in any case would be adequately accomplished by this method.[86]

Mr. Bayard, Democratic Senator from Delaware, took issue with Cummins on his statements. He wanted to know if the President had always been held accountable for his Cabinet. This invoked a reply from Cummins that the Democratic Party had certainly tried to hold Coolidge responsible for the Harding Cabinet in the 1924 elections. Mr. Bayard stated that he would not give the President complete choice of his Cabinet selectees.

Mr. Gillett, Republican Senator from Massachusetts, thought that the President's Cabinet nominations should be confirmed unless there

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[85] For pertinent arguments see CONG. REC., 69TH CONG., Vol. LXVII, 18-19, 31-32, 74-75, 83-84, 254-58.

[86] *Ibid.*

were glaring charges of incompetency against them. Senator Borah, Republican of Idaho, stated that he was against the Warren confirmation because the facts as presented indicated that he was unfit for the position. Fitness was the test in confirmation. Borah said that the Senate must do its constitutional duty in respect to Cabinet nominations as well as in other matters. The Senate was held jointly responsible for all nominations confirmed and must see that the Harding debacle was not repeated. He said that only upon the most substantial grounds and the most controlling reasons should the Senators oppose Presidential nominations to the Cabinet. The facts in the present case showed that Warren was an exception and should not, for the public's interest, be approved. Senator Norris, Republican from Nebraska, feared Warren's confirmation because of his Big Business connections.[87]

Senator Reed, Democrat from Missouri, opposed Warren because the nominee was not a proper person to enforce the Anti-Trust laws of the country.[88] Senator Couzens, Republican from Michigan, stated that he was opposed to Warren because the public could have no confidence in the man in any enforcement of the Anti-Trust laws. He said that his colleague, Senator Ferris, Democrat from Michigan, felt similarly.[89]

Senator Goff, Republican from West Virginia, favored Warren, because he was an attorney of great ability. He felt that the President should have the right to choose his Cabinet and that he should be held responsible to the nation for his selectees.[90] Senator Overman, Democrat from North Carolina, who voted against Warren on the principle of party regularity, stated that it was the right of the President to appoint his Cabinet officers and that if the laws were not enforced, the responsibility would rest on the President.[91] Senator Frank B. Willis, Republican from Ohio, speaking on March 18th before the annual dinner of the Central Mercantile Association of Ohio, stated that the rejection by the Senate of Charles B. Warren was an unwarranted interference with the prerogatives of the President.[92]

Coolidge's second attempt in March 1925 to have Warren confirmed was blocked in the Senate. He attempted to have Warren accept a recess appointment which the nominee refused. Coolidge then nominated an obscure lawyer from Vermont, Mr. Sargent, for the position. He was confirmed at once probably because the Senate wished

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[87] *Ibid.*
[88] *Id.* at 74.
[89] *Id.* at 100.
[90] *Id.* at 250-251.
[91] N. Y. Times, March 11, 1925, Vol. LXXIV, No. 24, 518, p. 5.
[92] N. Y. Times, March 19, 1925, No. 24, 526, p. 2.

to finish business and return home, and because nothing unfavorable appeared to exist against him.

Many reasons can be assigned why the nomination of Charles B. Warren was refused confirmation. The two most pertinent seem to be the Presidential-Old Guard battle with a Senate in rebellion, and the fear and dislike that many of the Senators held for Warren because of his "Sugar" connections.

Why was the Senate at odds with the President? The Senate was composed of four groups who were antagonistic to the administration, namely, the Democrats apparently for partisan reasons, the Insurgents who were against "Big Business" for fear of a recurrence of the Harding scandals and who voted as irregulars, the "Radicals" who were read out of the party because of their disloyalty in the 1924 Presidential election, and the Farmer-Laborites who were disposed to follow any policy against the vested interests of the moneyclass.

The Harding era had cast its shadow over anything that Coolidge might do. Ever in the minds of the opposititon was the fear of another debacle similar to the Denby-Fall-Daugherty affair. The people might consume only so much public corruption. The chain was tense — public opinion might rise to cast out those who favored "Big Business" and the money-magnates. Coolidge, as well as Harding, seemed to favor the interests of Big Business. The opposition naturally formed a coalition. The alliance of the four groups in opposition to the administration was based not alone on partisan grounds but also on the fear of corruption that had flowed from Big Business and might do so again with a "Sugar-coated" Warren as Attorney General.

Coolidge had not endeared himself to the Senate by his curt reply to that body when asked to rid himself of Denby. Who was the master — the President or the Senate? The Senate would show its powers conceivably in the People's interest. Coolidge was a cold type of personality who made few friends. His leadership could never be forceful and to dominate a Senate made up of many factions there had to be enterprise and ingenuity in the President. Coolidge, though honest, was not a Jackson or an F. D. Roosevelt. There was no magnetism in the man.

The Republican party lacked leadership in the Senate, and was a poorly organized body. The party should never have been caught by a surprise vote as happened in the first ballot on March 10th with the Vice President taking a nap in a distant hotel. Neither was it feasible to read the "Radical" group out of the party before the confirmation of Warren.

Warren was not liked. Some thought him an egoist, and many viewed him as a schemer who after he was placed in office would take

advice from no one. His reputation as an agent-representative-lawyer for the Sugar Trust and as president of the Michigan Sugar Company had not endeared him to the foes of Big Business. Too much "oil had passed over the dam" for many of the Senators to take kindly to a "Sugar-sweetened" man of the Warren type.

It is true that he had held responsible positions in the Government and had been confirmed by the Senate on the two occasions for ambassadorships. He had proven himself an able lawyer in the international arbitration cases. He had demonstrated that he was a man of energy and dispatch by his dealings in sugar, but those dealings had also indicated his Big Business connections. There was doubt as to what the Sherman Anti-Trust Act meant at the turn of the century; there had been far less question of its meaning in recent years, yet his Company, the Michigan Sugar Company, of which he was President until January 1925, was even then being investigated by the Federal Trade Commission for a conspiracy to restrain trade. Could Warren prosecute his former companions and friends if he became Attorney General and in the event cases arose requiring such prosecution? He had never been convicted in court of any law violations, but there remained a doubt in the minds of many as to what he "might" do if confronted with a situation similar to that of Daugherty in the Harding era. Warren's opponents had much upon which to base their refusal of confirmation.

Conclusions

Weighing the cases of rejection, the usual custom of the Senate to confirm Cabinet nominees of the President, the desires of the "Founding Fathers" at the time the Constitution was drafted, the overall ability of the Senate as a co-equal with the President in confirming wisely the nominees before it, it would seem that the Senate should remain a part of the executive in confirmation of Cabinet appointees.

However, the Senate's use of the word "unfitness" as to confirmation of Cabinet nominees should rise above partisan polititcs and the emotionalism that may develop between the Senate and the President. The test of whether a nominee should or should not be confirmed should be his ability and loyalty to serve the President and the American people well as a public servant. It is feared that, at times, this test has not been applied judiciously by the Senate.

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ARIZONA
LAW REVIEW

THE LAW OF NECESSITY AS APPLIED IN THE BISBEE DEPORTATION CASE

The most noted Arizona trial is *State v. Wootton,*[1] more commonly remembered as the *Bisbee Deportation* case. Its popular fame rests on its sensational facts, its legal interest upon its application of the seldom-invoked law of necessity.

Since the judgment for the defendant could not be appealed, the law of the case has been generally unavailable. As matter of interest, therefore, the *Arizona Law Review* presents it here, from the ruling of the trial judge[2] on the defendant's offer of proof.

A brief summary of the facts may be helpful, as an introduction.[3]

On April 26, 1917, hard on the heels of our declaration of war against Germany, a strike of copper miners in the Warren District of Cochise County, Arizona, was ordered by the Industrial Workers of the World—the I.W.W.. On July 12th an armed posse, organized by the sheriff and numbering more than 1000, rounded up some 1100 to 1200 of the strikers and their associates, including practically every member of the I.W.W. in the district, put them aboard a special freight train, and transported them under guard to Hermanas, near Columbus, New Mexico, where they were left to be cared for by federal troops. Eventually, about 200 of the possemen were charged with kidnaping, and one of them, H. E. Wootton, was selected to be brought to trial.

At the close of the state's case in chief, the defendant offered to prove that the I.W.W. had been organized about 1908 as an anarchistic conspiracy to overthrow the government and the capitalistic system by force; that these strikes in the Warren District and elsewhere were designed to obstruct the successful prosecution of the war; that at the time of the alleged kidnaping the conspirators were present in the Warren District in great numbers, to destroy the lives and property

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[1] Crim. No. 2685, Cochise County, Arizona, September 13, 1919.

[2] Samuel L. Pattee, born Chicopee Falls, Mass., 1869; admitted to bar, 1891 Minn., 1899, Ariz.; District Attorney of Yavapai County, 1901-1902; Code Commissioner for the Revised Statutes of Arizona, 1913; Assistant United States Attorney, 1915-16; Judge of the Superior Court, Pima County, 1916-1922; Lecturer in Law, University of Arizona College of Law, 1926-1929.

[3] For fuller accounts see: *The Trial of Harry E. Wootton for Kidnaping, Tombstone, Arizona, 1920,* 17 AMERICAN STATE TRIALS 1; U. S. Department of Labor, *Report on the Bisbee Deportations,* 1918; *The Law of Necessity as Applied in State of Arizona vs. H. E. Wootton,* Tucson: Bureau of Information (undated).

of its inhabitants; that they had assaulted and threatened its citizens and had accumulated quantities of dynamite, firearms, and ammunition to be used for their purposes; that the day before the deportation a leader of the conspirators had told the sheriff that he would no longer be responsible for the acts of his men; that the sheriff and possemen reasonably believed that the conspirators intended to commit many felonies in the district, including riot, treason, assault, murder, and the destruction of property, and that protection by the state and federal troops had been sought without avail; that the jails of the county were inadequate to confine the conspirators, and that as prudent men the defendant and his associates had reasonably believed that the deportation was imminently necessary for the preservation of life and property in the district.

The defendant contended that proof of these facts should be admitted, to show that he had acted in self-defense and under the law of necessity. The court ruled that self-defense could not be asserted under the tendered proof,[4] but expressed itself on the law of necessity.[5]

The other rule invoked by the defendant is what is termed the law of necessity, and it has been said that the law of necessity is that law that justifies by virtue of necessity the invasion of another's right. Much that has been said in argument has had reference to both self-defense and the so-called law of necessity. The argument of counsel for both parties respecting both these propositions has to a great extent overlapped. But the two are entirely distinct. The one is defensive; the other necessarily offensive. The distinction has thus been stated by a distinguished writer:

> The distinction between necessity and self-defense consists principally in the fact that while self-defense excuses the repulse of a wrong, necessity justifies the invasion of a right. It is therefore essential to self-defense that it should be a defense against a present unlawful attack, while necessity may be maintained through destroying conditions that are lawful.

And again:

> Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil. Wharton, Criminal Law, Sections 126, 128.

As stated by the Supreme Court of New Jersey in a case involving the destruction of buildings to prevent the spread of fire:

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[4] Relying on the Penal Code of Arizona, 1913, §§ 180 and 181.

[5] All of the following material is in the words of the Court, except where indicated by brackets.

> But the right to destroy property to prevent the spread of a conflagration rests upon other and very different grounds. It appertains to individuals, not to the state. It has no necessary connection with or dependence upon the sovereign power. It is a natural right existing independently of civil government. It is both anterior and superior to the rights derived from the social compact. It springs not from any right of property claimed or exercised by the agent of destruction in the property destroyed; but from the law of necessity. The principle as it is usually found stated in the books is, that "if a house in a street be on fire, the adjoining houses may be pulled down to save the city." But this is obviously intended as an example of the principle, rather than as a precise definition of its limits. The principle applies as well to personalty as to real estate; to goods as to houses; to life as to property — in solitude as in a crowded city; in a state of nature as in civil society. *Amer. Print Works vs. Lawrence,* 21 N.J.L. 248-257.

The application of this doctrine has frequently been considered in cases similar to that just cited involving the right to destroy property to prevent the spread of conflagration, and in such cases the rule seems to be settled that whenever it is necessary or reasonably appears to be necessary that property be destroyed to prevent the spread of fire the right of destruction arising from necessity exempts those committing the destruction from the liabilities that would ordinarily obtain in the case of the invasion of one's property rights by another. (*Hale vs. Lawrence,* 21 N.J.L. 714; *American Print Works vs. Lawrence,* 23 N.J.L. 590; *Keller vs. City of Corpus Christi,* 50 Tex. 614; *Conwell vs. Emrie,* 2 Ind. 265; *Field vs. City of Des Moines,* 39 Ia. 575; *Mayer, etc. vs. Lord,* 17 Wend. 285; *Mayor, etc. vs. Lord,* 18 Wend. 126.) The same rule has been applied where seamen, in order to avoid the perils of the sea on account of the unseaworthiness of the vessel, or to relieve themselves of conditions of intolerable hardship, were guilty of conduct which otherwise would have constituted mutiny, punishable by laws relating to that offense. (*U.S. vs. Ashton,* Fed. Cas. 14470; *U.S. vs. Bordon,* Fed. Cas. 14625.) And the same principle with relation to the seizure of private property by military officers. (*Mitchell vs. Harmony,* 13 How. 115.) And likewise as to the destruction of property to avoid the spread of disease, (*Seavey vs. Preble,* 64 Me. 120) in which it was said:

> To accomplish this object persons may be seized and restrained of their liberty or ordered to leave the state; private houses may be converted into hospitals and made subject to hospital regulations; buildings may be broken open and infected articles seized and destroyed, and many other things done which under ordinary circumstances would be considered a gross outrage upon the rights

of persons and property. This is allowed upon the same principle that houses are allowed to be torn down to stop a conflagration.

Salus populi suprema lex—the safety of the people is the supreme law—is the governing principle in such cases.

Where the public health and human life are concerned, the law requires the highest degree of care. It will not allow of experiments to see if a lesser degree of care will not answer. The keeper of a furious dog or a mad bull is not allowed to let them go at large to see whether they will bite or gore the neighbor's children. Nor is the dealer of nitroglycerine allowed in the presence of his customers to see how hard a kick a can of it will bear without exploding. Nor is the dealer in gunpowder allowed to see how near his magazine may be located to a blacksmith's forge without being blown up. * * * The law will not tolerate such experiments. It demands the exercise of all possible care. In all cases of doubt the safest course should be pursued, remembering that it is infinitely better to do too much than run the risk of doing too little.

As further illustrating the rule, see *Chesapeake & Ohio Ry. Co. vs. State,* 84 S.W. 586.

The law of necessity as laid down by these authorities is based purely upon the natural rights of the individual. It can neither be granted nor taken away by statute. It cannot be vested in any public officer nor the exercise of the right made a part of his official duties. And statutes purporting to grant public officers such right are construed to only prescribe regulations under which such right may be exercised. In speaking of such a case it was said by the Court of Appeals of New York:

The legislature does not in these cases authorize the destruction of property. It simply regulates that inherent inalienable right which exists in every individual to protect his life and his property from immediate destruction. This is a right which individuals do not surrender when they enter into the social state, and which cannot be taken from them. The acts of the legislature in such cases do not confer any right of destruction which would not exist independent of it, but they aim to introduce some method into the exercise of the right. *Wynhamer vs. People,* 13 N.Y. 441.

So also the quaint illustration in Wharton's notes that:

A person whose house is on fire may seize, without incurring the charge of felony, the hose of a neighbor as a means of extinguishing the fire. A person who is bathing and whose clothes have been stolen may snatch up clothing he may find on a clothesline so as not to be obliged to enter into a village naked. 1 Wharton Criminal Law, 11th Ed. 169.

And the more serious statement that:

If the safety of a city require that a house should be destroyed

> by gunpowder, and supposing there be no time to rescue all the inmates of the house, the killing of one of such inmates under the circumstances would be excusable. Idem. 815.

Without attempting to follow the elaborate arguments of counsel and the numerous authorities to which they have referred, it seems clear that there exists what is known as the rule of necessity applicable in some cases under circumstances of unavoidable peril, and when properly invoked, furnishing an excuse to one committing acts which would otherwise constitute a criminal offense. This rule is ordinarily invoked in cases involving the destruction of property, but in extreme cases may extend to the deprivation of life or liberty. Of course, there is a higher degree of sanctity in liberty or life than in any mere property right. The destruction of property is of vastly less moment than the deprivation of liberty or the taking of life, but the difference is not in kind but merely in degree, and to warrant the deprivation of liberty or life only requires a higher degree of peril than would warrant the destruction of property. As was said in *Hale vs. Lawrence*, 21 N.J.L. 714:

> It (referring to the law of necessity) is a natural right, not appertaining to sovereignty but to individuals considered as individuals. It is a natural right of which government cannot deprive the citizen and founded upon necessity and not expediency. It may be exercised by a single individual for his own personal safety or security, or for the preservation of his own property, or by a community of individuals in defense of their common safety or in the protection of their common rights. It is essentially a private and not a public or official right. It is a right not susceptible of any very precise definition, for the mode and manner and the extent of its exercise must depend on the nature and degree of the necessity that calls it into action, and this cannot be determined until the necessity is made to appear.

No doubt one seeking to justify what would otherwise be an unlawful act on the plea of necessity has the burden of showing that such necessity existed, and he must show that the anticipated peril sought to be averted was not disproportionate to the wrong, and to justify the deprivation of liberty he must show that the peril which called for such action was of a higher and more serious character than one which might justify the destruction of property or the invasion of property rights. "He who relies on the warrant of necessity or goes beyond the boundaries which ordinarily separate right from wrong takes the risk upon himself of proving that the circumstances were such as to justify his conduct." (*Hare's American Constitutional Law*, Vol. 2, 912.) And only where the threatened peril is immediate and overwhelming, or so appears to a reasonable man under all the

circumstances, and can only be averted by violence of the character involved in this case, can the law of necessity be invoked to justify the use of such violence.

Much reliance is placed by counsel for the state upon *Ex parte Milligan*, 4 Wallace 2, and as that case was much commented upon by counsel for both sides, an examination of it becomes important in order to determine what actually was decided and to what extent it bears upon the propositions under consideration in this case. [The court then demonstrates that *Milligan* does not involve the law of necessity.]

Many of the decisions cited by counsel for the defendant are cases based upon situations growing out of declarations of martial law by state executives, or a modified form of martial law in particular portions of a state. Many of them justify such declaration and the proceedings of military officers in detaining persons whose being at large might be inimical to the public welfare. One or two sustain the right under certain conditions to establish a military tribunal with authority to try and sentence those found guilty of public offense. Most of them, however, justify nothing more than temporary detention, applying in full the rule laid down in *Ex parte Milligan* with respect to the power to create a military tribunal and the power of such a tribunal to pass upon the guilt or innocence of one charged with a public offense. (*Ex parte McDonald*, 143 Pac. 947.) But these cases, while perhaps enlightening, do not seem to affect any question involved in this case. Martial law had not been declared in the Warren District, nor, under the claim set up by the defendant, were he and those associated with him acting as military officers. Whatever power the Sheriff might have when properly acting as an officer of the law, the character of the claim made by the defendant in this case is such to preclude any idea of justification or excuse on that ground. If, as contended and as held by the authorities before cited, the rule is confined to the narrow limit of protecting a person or a community against imminent peril, by an invasion of the rights of others demanded by a great and overruling necessity, such right is a natural one merely and is wholly apart from any constitutional or statutory authority vested in military or peace officers.

It is urged with great earnestness by counsel for the state that an officer of the law arresting a person accused or suspected of crime, with or without warrant, must take the person arrested before a magistrate or proper tribunal, and failing to do so his conduct becomes wrongful and subjects the officer to both criminal and civil liability. The authorities cited abundantly sustain that position. One arresting an offender without a warrant must take him before a proper court

or magistrate, and in the event of his failure to do so is liable to a civil action brought by the person arrested or to a criminal prosecution. (*Brock vs. Stimson*, 148 Mass. 20; *Phillips vs. Fadden*, 125 Mass. 198; *People vs. Fick*, 26 Pac. 759; *State v. Parker*, 75 N. Car. 189; *Johnson vs. Americus*, 46 Ga. 85.) Nor can there be any doubt as to the correctness of the proposition urged by the state that one arresting under process valid upon its face must strictly pursue the command of the process, and that a failure to do so or a going beyond the authority given by the process renders the act of the arresting officer illegal *ab initio*. (*People vs. Fick*, supra.)

One arresting lawfully without a warrant must promptly take the person arrested before a magistrate and cause a proper warrant to be issued, else his action, though originally legal, will become void from the beginning. (*Pastor vs. Regan*, 30 N.Y.Sup. 657.) So also an arrest may not be made upon information communicated by telegraph from officers of another state without some more reliable information warranting the belief that a crime has been committed. (*Malcomson vs. Scott*, 23 N.W. 166; *Cunningham vs. Baker*, 16 So. 68.) The statutes of this state prescribe the duties of officers making arrests substantially in conformity with the rules laid down in the authorities above cited. Thus, under Section 843, Penal Code, relating to arrests upon a warrant properly issued, it is provided that if the offense charged be a felony the officer making the arrest must take the defendant before the magistrate who issued the warrant, or in case of his absence or inability to act, before the nearest or most accessible magistrate in the county. And under Section 844, if the offense be a misdemeanor, the officer must bring the accused before a magistrate of the county where the arrest is made. And by Section 850 it is provided that an officer who executes the warrant shall take the defendant before the nearest or most accessible magistrate in the county in which the offense is triable, in cases where the warrant is issued by a magistrate of a county other than that in which the offense was committed. Section 852 provides that an arrest may be made by a peace officer or a private person, and Sections 854 and 855 provide:

> A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:
> (1) For a public offense committed or attempted in his presence.
> (2) When a person arrested has committed a felony, although not in his presence.
> (3) When a felony has been committed in fact, and he has reasonable cause for believing the person arrested to have committed it.
> (4) On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

(5) At night, when there is a reasonable cause to believe that he has committed a felony.

A private person may arrest another:
(1) For a public offense committed or attempted in his presence.
(2) When the person arrested has committed a felony, although not in his presence.
(3)When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it..

Section 867 of the Penal Code provides:

'When an arrest is made without a warrant by a peace officer or private person, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made, and a complaint stating the charge against the person must be laid before such magistrate.'

No doubt can be entertained, therefore, that the plain duty of an officer or a private person making an arrest is to promptly, or, in the language of the statute, without unnecessary delay, take the person arrested before a magistrate that further proceedings may be had against him in accordance with law. Nor can there be any doubt that for a failure to perform that duty the arresting officer or person is liable both civilly and criminally. Nor can there be any doubt that the forcible taking of the person arrested outside the limits of the state is a gross and inexcusable violation of the duty of the officer or person making the arrest, and he cannot be heard to justify such act by claiming that he acted as an officer or by command of an officer in making the arrest. The evidence so far introduced only identifies the defendant, Wootton, and a few other persons of the large number who associated in the taking of Brown and others to New Mexico. But in the facts offered to be proved by the defendant it is asserted that Wheeler, then Sheriff of Cochise County, was in command of the body of men who carried out the deportation. No claim is made that there was any taking of Brown or any of the persons deported before a magistrate. On the contrary, the evidence already given on behalf of the state and that proposed to be given on behlaf of the defendant conclusively shows that so far from being taken before any court, a complaint filed and a warrant procured, or any other proceedings taken, the parties seized were promptly carried out of the state to a point where no proceedings could be had against them, and there left. The result is that Wheeler could not legally justify his conduct on the theory that he was a peace officer acting in the performance of his duty. Nor can the defendant justify on the ground that he was a deputy of Wheeler or a member of a *posse comitatus*

summoned by Wheeler to assist him in the performance of an official duty. In the argument of counsel for the defendant the responsibility of a member of the *posse comitatus* was barely touched upon, and the question was not really presented. But counsel for the state in his argument cited persuasive authority to the effect that a member of a posse cannot justify his action unless the officer summoning the posse was in turn justified. The rule stated by such authorities is that an officer has no right to command another to perform an unlawful act, and one summoned by an officer to assist him acts at his peril, and regardless of his individual good faith his conduct cannot be justified if the action of the officer summoning him was in turn illegal. (*Mitchell vs. State*, 12 Ark. 60). Neither Wheeler nor any of those associated with him in the so-called deportation can justify by virtue of official action. But this is the extent and limit of the rules stated in the authorities cited by counsel for the state on that subject. It does not in the least affect the application of the rule of necessity of that rule be applicable. The right to act because of necessity is, as shown by the authorities before cited, a natural right vested only in persons as individuals and cannot be vested in any public officer, though its exercise may be subjected to statutory regulations. Neither Wheeler nor his deputies nor those acting at his command could as officers or aides to an officer act under the law of necessity. If they so acted they must necessarily have acted as individuals and as members of the community, and in so doing they could not avail themselves of any rights that the law gives to an officer nor be subject to liabilities for the violation of the duties of officers. Their acts were entirely beyond and outside, and must so have been, of any official duty, and their right to claim to be excused on the ground of necessity depends upon the existenece of a situation which would warrant individuals in acting under that rule.

It remains to apply these general rules of law to the facts sought to be proven by the defendant. [The court here discusses defenses other than the law of necessity.]

As to the rule of necessity: It has been shown by the authorities before cited that there *is* such a rule and in a case justifying its application the party acting by reason of necessity is excused from the consequences of what would otherwise be a criminal act. The cases are and must be rare and conditions exceptional in which such a rule may be invoked. No case exactly like the present has been found in which it was invoked. Nevertheless, the rule remains, though, as stated by the authorities, it is difficult to define its extent or the cases in which it may be applied. Each must necessarily stand upon its own facts, and as no two cases are exactly alike, necessarily as each arises

the application must be made according to the nature of the situation presented. The unusual character of the defense and the infrequency with which it is claimed naturally requires caution to see that a case is presented justifying the accused in invoking the rule. Naturally the first impression the mind entertains is that such a defense is rather a desperate attempt to escape the consequences of criminal conduct than a *bona fide* excuse for such conduct. But if the defense be asserted and evidence presented which comes within the rule as laid down by the authorities, it must be passed upon as any other defense, and it may be said in passing that in this case, though it may have aroused great public interest, no different rule obtains than in a case of less importance. It stands exactly in the same position and should be considered in the same manner as a case where one obscure citizen is charged with kidnaping another equally obscure, and in which no public interest has been manifested and no animosities engendered. Ordinarily the question here involved is one of fact to be determined by the jury. As was said in *Hale vs. Lawrence,* 21 N.J.L. 714:

> This justification, therefore, under a plea of necessity is always a question of fact to be tried by a jury and settled by their verdict, unless the sovereign authority shall have constitutionally provided some other mode.

This, of course, must be taken to mean that where there is evidence tending to establish such justification, its weight and sufficiency are for the jury, and the Court may pass upon it as a matter of law only where evidence is wholly wanting and may exclude proof of a given state of facts only when that state of facts could not in any event warrant the interposition of this plea. A case much discussed as involving both the right to assert this defense and the manner in which it should be determined is *Commonwealth vs. Blodgett,* 12 Metcalf, 56. This case grew out of a controversy that arose in Rhode Island, sometimes referred to as Dorr's Rebellion, in which one Thomas W. Dorr was the head of an insurrection "to overthrow by force of arms the government and the constitution of that state, and to impose and substitute another government and constitution in its stead." The prosecution was against certain persons who had acted as members of the military forces of the regular government of the State of Rhode Island under command of a military officer of that state. The charge was that of kidnapping based upon the statute of Massachusetts, differing in language from ours but of the same general nature. It appeared that the followers of Dorr, including the persons alleged to have been kidnapped, had been dispersed and scattered into the adjacent states of Connecticut and Massachusetts. Four of such persons with whose kidnapping the accused were charged had taken refuge in Massachusetts and at the time of the

alleged kidnapping were at a house within the State of Massachusetts wholly unarmed and at the time conducting themselves in a peaceful manner. The accused came to the house where the person referred to were stopping, seized them in the middle of the night, carried them to the State of Rhode Island and turned them over to the military authorities. Among other defenses asserted was the plea of necessity in that it was necessary to the safety of the citizens of Rhode Island and their property, and the State of Rhode Island itself, that these insurrectionists should be seized and their potential activities prevented. In support of this defense evidence was given respecting the conditions existing at the time of the seizure of the persons referred to, and of the history of the rebellion in Rhode Island, which gave rise to their capture. The trial court instructed the jury that 'if there existed a necessity for the defense or protection of the lives and property of the citizens of Rhode Island, or for the defense of the State of Rhode Island, that the defendants should do the act complained of in the indictment, or if there was probable cause at the time to suppose the existence of such necessity, and the jury found such necessity or probable cause of necessity, then they were to acquit the defendants.' And again the trial court also gave an instruction that 'such capture by the troops of Rhode Island under the orders of Rhode Island was unlawful unless necessary in defense of lives and property of the citizens of Rhode Island, or in defense of the state at the time; of which necessity or probable cause of necessity, or that there was probable cause at the time to suppose the existence of such a necessity, the jury and not the State of Rhode Island was the proper judge.' The case was one of great public interest, and the matter out of which it grew is a historical incident of importance. All the questions raised in the case were discussed at great length in an opinion delivered by Chief Justice Shaw. Counsel vie with each other in their tributes to the learning and ability of that great jurist, and undoubtedly his utterances are entitled to the greatest weight as authority. The propriety of the instructions above quoted was considered by the court and their correctness upheld, and the court summed up its conclusions with respect to them by saying that, 'on the whole, the court are of opinion that the instructions were correct and carefully considered,' and the exceptions were accordingly overruled. The similarity in many respects of the situation presented in that case with that involved in this and the great weight to be given to the statements of the court which rendered the opinion, and especially to the eminent jurist in whose language it was couched, caused the Court to invite consideration of it by counsel for both parties. The state has attempted to draw a distinction between that case and this in that in this case the parties claimed to have been kidnapped were taken out of the state to a place

where for any infractions of law that may have been committed they could not be proceeded against, and in that case the parties were taken to Rhode Island where suitable proceedings might be had against them for their participation in an insurrection against the lawful authority of the state. The soundness of this attempted distinction is not perceived. The crime of kidnapping as defined by our statutes requires neither malicious purpose nor criminal intent beyond the intent to commit the act which is made unlawful. The purpose of the act is not material, and no unlawful purpose need be alleged or proven. If the act itself is unlawful it constitutes the crime regardless of the purpose or intent of the perpetrator. The crime is as completely established by proof of an unlawful carrying of another person from one state to another for the purpose of prosecution as for any other purpose however unlawful. (24 Cyc. 798; *State vs. Backarow,* 38 La. Ann., 316; *People vs. Fick,* 26 Pac. 760; *John vs. State,* 44 Pac. 51.) If one is taken forcibly and without proper legal proceedings from one state to another for the purpose of being prosecuted in the latter state for a crime committed there, those taking him are guilty of kidnapping. The one kidnapped may be prosecuted after his removal to the state in which the crime is claimed to have been committed, and he may not complain of the manner in which he was brought into the state, because he does not in his own person represent the sovereignty of either state, and only the state can complain. (*Ex parte Moyer,* 85 Pac. 897.) But the state from which he was taken may prosecute those doing the taking, and it is no defense to a charge of kidnapping that the purpose was to bring the person kidnapped before a proper court for prosecution. This is abundantly shown by *Mahon vs. Justice,* 127 U.S. 700, and the numerous cases cited in the opinion. Had the persons claimed to have been kidnapped in this case fled into New Mexico and had the accused gone to that state and forcibly brought them back into this State, the crime of kidnapping (unless some excuse or justification other than the purpose of prosecuting had been shown) would have been as complete as would a forcible taking in the opposite direction. Indeed, such is the provision of the very statute under which this prosecution is brought. Section 185, Penal Code of Arizona, provides that:

> Every person who forcibly steals, takes or arrests any person in this state, and carries him into another country, state or county, or into another part of the same county, or who forcibly takes or arrests any person, with a design to take him out of this state * * * and every person who, being out of this state, abducts, or takes by force or fraud any person contrary to the laws of the place where such act is committed, and brings, sends, or conveys such person within

the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnapping.

The crime involed in this case may therefore consist either in forcibly taking a person out of the state into another state, or from another state into this, and no distinction is made between the two acts that constitute the particular offense. If it were lawful to forcibly seize a person suspected or accused of crime and bring him from another state into the state where the crime is alleged to have been committed, and such purpose would relieve those committing the seizure from criminal responsibility, the distinction urged by the state would be well taken. But where the offense is precisely the same and the object of the seizure in no way relieves the act from criminality, it can make no difference and can in no way militate against the force of the authority cited. *Commonwealth vs. Blodgett* is therefore a direct authority in support of the view that the question of necessity is one for the jury.

It was urged with great earnestness by one of the counsel for the state that, conceding for the sake of the argument, the right to arrest the persons claimed to have been kidnapped and to place them under restraint or in confinement, as a matter of law there could be no necessity for removing them outside the state. It is difficult to differentiate between different parts of the transaction. Indeed, under the circumstances shown by the evidence introduced on behalf of the state and that proposed to be introduced by the defendant, the whole transaction may be regarded as one act. As was said in one of the cases cited by the state, "in this case the arrest of the woman and her conveyance into Placer County and there placing her in the house of China Molly, constitute one continuous act, and for the purpose of determining the intention of the defendant when he made the arrest or at any other time when he had the woman in custody, it is proper to look at the entire transaction as one act, from its beginning to its consummation." (*People vs. Fick, supra.*) The offer of proof made by the defendant asserts that the circumstances gave rise to the necessity to not only remove the parties deported to the ball park, but to remove them such a distance as would avoid the threatened danger. The somewhat fanciful suggestion of counsel for the state that the persons captured might have been required to construct for themselves a place of confinement within the limits of this county is not entitled to serious consideration. No authority exists in law to require any such action on the part of a person arrested. Undoubtedly the rule of necessity is one that can arise only on rare occasions and should be confined within the strictest limits. Even though a necessity existed warranting such measures as were taken in this case, if at any time the accused went beyond the limits of necessity, or of what reasonably

appeared to be necessary, the necessity then ceased to exist, and thereafter criminal responsibility would attach to any further acts committed, but this upon the matters stated in the offer of proof is a question for the jury.

The state, in taking the position it does, necessarily assumes for the sake of the argument the truth of the statements made in the offer of proof, and necessarily concedes for the same purpose that the proof will measure up to the offer. [The court then summarizes the offer of proof, substantially as has been done above.]

Laying aside for the moment the offer of proof with respect to a conspiracy existing long prior to the acts complained of, the offer of proof as to conditions existing in the Warren District at the time of the so-called deportation, the purpose and intent of the persons deported, the contemplated destruction of lives and property within that district, the preparations to carry out that intent and the acts and conduct as well as the statements of the persons deported, present a situation where it cannot be said as a matter of law that the rule of necessity cannot be applicable, but rather leaves the question of the existence of such necessity to be determined by the jury as a question of fact under proper instructions. If such were the conditions and the citizens of Bisbee had called in vain upon state and federal authorities for protection against a threatened calamity such as is set forth in the offer of proof, it cannot be said as a matter of law that they must sit supinely by and await the destructiton of their lives and property without having the right to take steps to protect themselves.

It ought not to be necessary to state that the Court has nothing to do with questions of fact except to see that they are properly submitted to the jury, and can neither pass upon nor express any opinion upon the question whether the conditions claimed to have existed in the Warren District in fact existed. Many statements were made by counsel in argument in the way of controverting or denying the existence of the situation claimed, and while such arguments may have been well enough in order that the position of counsel might not be misapprehended and that it might not be thought that they conceded the actual truth of the matters claimed, it is obvious for the purpose of passing upon the questions presented both the state and the Court must act upon the assumption that the facts stated in the offer of proof will be shown, and that the proof when presented will fully measure up to the offer. Nor ought it to be necessary to again state that when a defendant in a criminal case offers to produce evidence in support of a claimed defense, such evidence can only be summarily excluded and the defense entirely rejected when it clearly appears as

a matter of law that the evidence if received could not tend to prove any legal defense. The Court does not attempt to say what were or were not the facts surrounding the act complained of, nor what conditions existed at the time. It only holds that upon the facts set forth in the offer of proof the question is one of fact for the jury and not one of law for the Court.

So far the offer of proof made by the defendant has been taken as a whole and the questions presented at such length have been considered with reference to that offer taken in its entirety. But many matters set forth therein may be subject to well-founded objection. The question of necessity may be governed by the conditions and the situation as they existed at the time of the commission of the act and immediately prior thereto at the place or in the vicinity of the commission of the act, and evidence as to matters preceding may not be admissible. In cases like many of those cited where the claim of necessity existed with respect to the destruction of, or injury to property, it is obvious that the necessity depended upon the situation as it existed at the time of the destruction. One claiming the right to destroy buildings to prevent the spread of a conflagration must necessarily have that right determined by the condition existing or appearing to a reasonable man to exist at the time of the destruction; that a conspiracy had been formed to start the fire would be wholly immaterial. So in this case it may be that the claimed conspiracy antedating the conditions, whatever they may have been, in the Warren District at and prior to the so-called deportation, may be entirely outside the evidence legitimately admissible. It does not appear clearly that the persons charged with the kidnapping had any knowledge of such conspiracy or acted upon any information as to its existence.. It was said in one of the cases cited that after-acquired knowledge cannot justify an illegal arrest, and so after-acquired knowledge may not be admissible upon the question of necessity. It may be that the right to act under the stress of necessity must be determined by the conditions existing at the time of the commission of the act done under such a claim of right, and that the proof bearing upon the necessity must be limited to that extent. The question was not discussed by counsel and is too serious to be passed upon without such discussion. It would seem, however, that the proof should first show what those conditions were before any evidence of an antecedent conspiracy to bring about those conditions could be shown, and after the submission of evidence respecting existing conditions the Court would then be in a position to determine whether the other evidence is admissible. The attention of counsel is called to the case of *People vs. Schmidt*, 165 Pac. 555.

The questions discussed have been presented before the opening statement of counsel for the defendant and bore as well upon his right to make such statement as to the admissibility of the evidence proposed to be introduced. The character as well as the extent of an opening statement of a case to the jury is left much to the discretion of the trial court, and while the right to make such statement is a matter of right, the Court may place such limitations upon that right as in its discretion are deemed proper. (*U. S. Fidelity & Guaranty Co. vs. Postker,* 102 N.E. 372.) To avoid possible prejudice and a statement of matters which after argument might be held inadmissible, counsel for the defendant will not be permitted to make any statement with reference to the alleged conspiracy existing outside the Warren District, but will confine himself to a statement of what he proposes to show with respect to conditions in that district at and prior to the time of the so-called deportation, and the acts and conduct of the parties accused and those claimed to have been deported. No prejudice can result should the evidence of a conspiracy be held admissible, because the jury will undoubtedly be able to appreciate its scope and purpose, and if admitted it will be a subject of discussion by counsel in the closing argument and of the Court in its instructions. But the Court is in grave doubt as to the admissibility of such evidence and will require, therefore, the exclusion of all reference to it until its admissibility can be properly determined.

Much has been said respecting the effect of a mere statement of the matters sought to be shown by the defendant and the prejudice likely to arise in the minds of the jurors from such statement, and the assertion that the mere mention of the name of a certain organization will give rise to such feeling on the part of the jurors that a fair consideration of the evidence cannot be obtained. But the Court cannot believe that substantial citizens of Cochise County of the character of those empanelled as jurors in this care are so lacking in intelligence or so wanting in appreciation of their duties as to be influenced by any such matter, or that the fear that a verdict will be based on prejudice instead of proof has any substantial basis.

The foregoing are the views of the Court as to the rules of law and their application to this case, formed after careful examination of the authorities cited and full consideration of the arguments presented, and these views will govern the further proceedings in the trial of this case."

[At the conclusion of the trial the case was submitted to the jury, which deliberated but 15 minutes and reached a verdict of "Not guilty" on the first ballot.]

NOTES

ATTORNEY AND CLIENT—TERMINATION OF RELATION—CLIENTS' FAILURE TO COMPENSATE MAY NOT BE SUFFICIENT CAUSE.—Two Alaskan attorneys who had represented certain Indian villages in litigation in the District Court for the District (Territory) of Alaska, entered an appearance as counsel for the appellant villages in the Supreme Court of Alaska in order that appeals might be taken by outside counsel not authorized to practice law in that state. When it became necessary to take further steps to perfect the appeals the Alaskan attorneys filed a motion to withdraw on the grounds that they had not been paid for past services. On the motion, *held*, denied. Since counsel had entered their appearance as attorneys for the appellants, they would not be permitted to withdraw in the absence of substitution of other qualified counsel, regardless of whether they had been unfairly denied compensation for past services and might be unable to recover for future services. *Organized Village of Kake v. Eagan*, 354 P.2d 1108 (Alaska 1960).

When an attorney accepts employment this involves the assumption of an entire contract obligating him to conduct the particular litigation through to termination.[1] Once an attorney has made a formal appearance upon the record, the express permission of the court is required to release the attorney from his obligation.[2] Ordinarily consent of the client will be the only approval required for an attorney to withdraw from the case.[3] In the absence of consent, an attorney can withdraw only for sufficient cause after giving reasonable notice and obtaining permission from the court.[4] Even if there exists an adequate cause, withdrawal is not a matter of right, but rather rests within the discretion of the court.[5] There is no set standard to determine what is a justifiable cause for withdrawal.[6] Sufficient justifica-

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[1] Louvorn v. Johnston, 118 F.2d 704 (9th Cir. 1941); Henderson v. Henderson, 232 N. C. 1, 59 S.E.2d 227 (1950); McLaughlin v. Nittleton, 47 Okla. 407, 148 Pac. 987 (1915).

CANNONS OF PROFESSIONAL ETHICS, No. 44 "The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause."

[2] People v. Massey, 137 Cal. App. 2d 623, 290 P.2d 906 (1955); *In re* O'Brien, 93 Vt. 194, 107 Atl. 487 (1919).

[3] Thompson v. Dickinson, 159 Mass. 210, 34 N.E. 262 (1893).

[4] Fever v. Fever, 156 Fla. 117, 22 So. 2d 641 (1945); People v. Franklin, 415 Ill. 514, 114 N.E.2d 661 (1953); Powers v. Manning, 154 Mass. 370, 28 N.E. 290 (1891).

[5] Linn v. Superior Court, 79 Cal. App. 721, 250 Pac. 880 (1926).

[6] For a statement to that effect, see Genrow v. Flynn, 166 Mich. 564, 568, 131 N.W. 1115, 1116 (1911) (dictum).

tion has been found where the client abused and humiliated the attorney,[7] refused to pay necessary expenses of litigation,[8] refused to make agreement as to fees,[9] refused to make advancements to apply to attorney's fees during prolonged litigation,[10] and for non-payment for past services.[11] However, there may be circumstances in which the non-payment of expenses of litigation or the value of services thus far performed will not justify the attorney in withdrawing.[12] The right of withdrawal may properly be denied where the motion is made in the course of a trial[13] or immediately prior to the final disposition of the case[14] if this would result in an injustice to the client,[15] for no lawyer may abandon a cause at a critical stage and leave his client helpless in an emergency.[16]

Since Alaska only recently became a state,[17] its judicial decisions are limited. The rules of the Supreme Court of Alaska provide that only attorneys admitted to practice law in the state of Alaska will be qualified to practice before the court.[18] It is also required that all documents presented to the court, other than records, must bear the signature of and be presented by a member of the state bar of Alaska.[19] Here the court relied on the appearance of Alaskan counsel in allowing the motion for appeal, and in holding further proceedings in abeyance pending disposition of certain appeals to the United States Supreme Court, in the expectation that Alaskan counsel would be available to further process the appeal in the state supreme court. In addition, this case was extremely important in that the final decision would affect the Alaskan fishing industry, one of the major sources of income for the state.

CANNONS OF PROFESSIONAL ETHICS, No. 44, points out that: "The lawyer should not throw up the unfinished task to the detriment of his client except for the reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement . . . as to fees . . . the lawyer may be warranted in withdrawing. . . ."

[7] Mutter v. Burgess, 87 Colo. 580, 290 Pac. 269 (1930) (attorney accused by client of dishonesty).

[8] Eliot v. Lawton, 7 Allen (Mass.) 274, 83 Am. Dec. 683 (1863) (dictum).

[9] *In re* Coffin's Estate, 189 Iowa 862, 179 N.W. 123 (1920) (attorney hired only for collection but trial found necessary); Gosnell v. Hilliard, 205 N.C. 297, 171 S.E. 52 (1933).

[10] Young v. Lanznar, 133 Mo. App. 130, 112 S.W. 17 (1908); Tenney v. Berger, 93 N.Y. 524, 45 Am. Rep. 263 (1883).

[11] Silver Peak Gold Mining Co. v. Harris, 116 Fed. 439 (D. Nev. 1902).

[12] Cassel v. Gregori, 28 Cal. App. 2d 769, 70 P.2d 721 (1937); Pickard v. Pickard, 83 Hun 338, 31 N.Y.S. 987 (Sup. Ct. 1894).

[13] Finch v. Wallberg Dredging Co., 76 Idaho 246, 281 P.2d 136 (1955) (dictum).

[14] *Id.* at 247, 281 P.2d at 138.

[15] McInnes v. Sutton, 35 Wash. 384, 77 Pac. 736 (1904) (dictum).

[16] *Id.* at 386, 77 Pac. at 737.

[17] The election was authorized by 72 Stat. 339 (1958); and upon favorable vote and Presidential Proclamation issued January 6, 1959, Alaska was admitted to statehood. Exec. Order No. 3269, 24 Fed. Reg. 81.

[18] ALASKA SUP. CT. R. 4.

[19] ALASKA SUP. CT. R. 46(f).

Counsel waited six months before deciding to withdraw just before additional steps in the appeal were required. The court, in attempting to determine whether the failure to pay counsel for past services justified granting the withdrawal request,[20] looked to the factors pointed out previously to justify denying the motion to withdraw and to exercise the right to grant or reject counsel's request.[21]

Arizona through its court rules[22] and judicial interpretation[23] seems to concur with the decision of the Alaska supreme court. The attorney's right to withdraw from his employment, once assumed, exists only with the approval of the court.[24] The question of whether failure to compensate is sufficient "good cause," for an attorney's withdrawal is still to be settled in Arizona; but decisions from other jurisdictions,[25] as pointed out previously, grant or deny the motion to withdraw depending on the particular circumstances of the case.

The Alaska court in rendering its decision in the *Kake Village* case was on sound ground. In denying or granting a motion to withdraw the court must be guided by considerations additional to those concerned with the obligation of the client to pay his attorney what is due. An attorney is an officer of the court,[26] as well as an agent of his client, and as such he is liable to both for the faithful performance of his duties.

Donald J. Kenney

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[20] Silver Peak Gold Mining Co. v. Harris, 116 Fed. 439 (D. Nev. 1902). This Nevada case deciding the issue of failure of compensation as adequate cause for withdrawal is distinguishable from the principal case in that the promise to pay was made by the clients themselves, while here the Department of Interior, not the clients, was responsible for the contract and, as the Alaskan court stated, for treating the counsel unfairly. *Organized Village of Kake v. Eagan*, 354 P.2d 1108 (Alaska 1960).

[21] Daggett v. Deauville Corp., 148 F.2d 881 (5th Cir. 1945); Louvorn v. Johnston, 118 F.2d 704 (9th Cir. 1941).

[22] ARIZ. R. CIV. P. 80(E): "When the appearance of counsel has been entered for a party in any action or proceeding, he will be held responsible by the court for the conduct of the action until formal notice of withdrawal approved by the court and entered upon the minutes."

[23] State v. Graninger, 87 Ariz. 152, 348 P.2d 921 (1960). Here the Arizona Supreme Court refused to find error in the lower court's denial of a motion to withdraw by an attorney who had become the attorney of record for the defendant, when the plaintiff has been informed of the attorney's withdrawal from the case

[24] Louvorn v. Johnston, 118 F.2d 704 (9th Cir. 1941).

[25] For a list of cases and circumstances see: WOOD, FEE CONTRACTS FOR LAWYERS § 72 (1936); 11 MINN. L. REV. 552 (1927); 18 N.C.L. REV. 338 (1940); 39 YALE L.J. 276 (1930).

For a discussion of the effect of the service of process on the attorney of record, when the plaintiff has been informed of the attorney's withdrawal from the case see, 2 ARIZ. L. REV. 137 (1960), a note commenting on, Schatt v. O. S. Stapely Co., 84 Ariz. 58, 323 P.2d 953 (1958).

[26] People v. Franklin, 415 Ill. 514, 114 N.E.2d 661 (1953).

CONSTITUTIONAL LAW — AUTOMOBILES — FINANCIAL RESPONSIBILITY LAW.—The defendant was tried and convicted before a Justice of the Peace for driving a motor vehicle while under a license suspension order issued by the State Motor Vehicle Department. The County Court reversed and entered judgment of acquittal. On appeal, *held*, affirmed. The requirement of the Safety Responsibility Law[1] that the Director of Revenue suspend the license of each operator and all registrations of each owner of a motor vehicle involved in an accident in which there is personal injury or $50 or more property damage, unless such persons deposit security sufficient in the director's judgment to satisfy any judgments for damages resulting from the accident, is unconstitutional. *People v. Nothaus*, 363 P.2d 180 (Colo. 1961).

Three major proposals have been suggested for the alleviation of the national social problem of uncompensated motor vehicle accident victims:[2] a system analagous to workmen's compensation acts,[3] compulsory motor vehicle liability insurance laws,[4] and financial and safety responsibility laws.[5] The last proposal, having been adopted by legis-

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[1] COLO. REV. STAT. ANN. § 13-7-7(1) (1953).

The director, within sixty days after the receipt of a report of a motor-vehicle accident within this state which has resulted in bodily injury or death or damage to the property of any one person in excess of fifty dollars, shall suspend the license of each operator and all registrations of each owner of a motor vehicle in any manner involved in such accident. If such operator is a non-resident the privilege of operating a motor vehicle within this state shall be suspended, and if such owner is a non-resident the privilege of the use within this state of any motor vehicle owned by him shall be suspended, unless such operator or owner or both shall deposit security in a sum which shall be sufficient in the judgment of the director to satisfy any judgments for damages resulting from such accident as may be recovered against such operator or owner. Notice of such suspension shall state the amount required as security, which in no event shall exceed the sum of eleven thousand dollars.

[2] See generally 3 LAW & CONTEMP. PROB. 465, 466 (1936); 11 ROCKY MT. L. REV. 12 (1938).

[3] No American state has enacted such a proposal. See generally 3 LAW & CONTEMP. PROB. 579, 583, 598 (1936); 27 TUL. L. REV. 341 (1953).

[4] Massachusetts is the only state to accept such a plan. The law was adopted in 1925 to take effect on January 1, 1927. Mass. Acts 1925, c. 346, MASS. GEN. LAWS ch. 90 (1932). See generally 19 BROOKLYN L. REV. 11 (1953); 33 IOWA L. REV. 522 (1948); 3 LAW & CONTEMP. PROB. 537, 554, 565, 571 (1936); 27 TUL. L. REV. 341 (1953).

[5] The first financial responsibility law was enacted in Connecticut in 1925. CONN. PUB. ACTS 1925, c. 183. In general, these laws are all designed to achieve the following objectives: (1) to compel or encourage motorists to make themselves financially responsible. This, under the usual financial responsibility law, would be accomplished by inducing motorists to carry liability insurance; (2) to keep off the highways those who are not financially responsible (this being implemented principally by operation of the provisions for suspension of the license and registration); (3) to promote safety on the highways. To the extent that financially irresponsible motorists are also careless in their driving habits, safety responsibility laws promote safety on the highways by depriving those who are not financially responsible of their vehicle operating and registration privileges. 40 ILL. L. REV. 237 (1945). On the success of these laws in reaching their objectives, see generally 19 BROOKLYN L. REV. 11 (1953); 33 IOWA L. REV. 522 (1948); 3 LAW & CONTEMP. PROB. 519, 531 (1936).

lation in every state except Massachusetts, has taken different forms in the statutes.[6] With only a very few exceptions,[7] the courts have upheld the validity of the various state motor vehicle financial responsibility acts against objections of all varieties.[8]

The Supreme Court of Colorado, in holding their state's financial responsibility law unconstitutional, relied primarily on two grounds: first that Nothaus was denied due process of law by the revocation of his operator's license without a hearing or trial; and second that the statute in question has nothing whatever to do with the protection of the public safety, health, morals or welfare, and is therefore an unreasonable restraint upon the freedom of the individual to make use of the public highways which cannot be sustained as a proper exercise of the police power of the state.

As to the first ground, the court in the principal case stated:

> Such action [depriving Nothaus of the right to drive a motor vehicle on the highways] cannot be taken without notice to the party affected and without an opportunity for him to be heard on the question of whether sufficient grounds exist to warrant a revocation of his right to drive a motor vehicle upon the highways of the state.[9]

It has been generally held by other courts that suspension of the license prior to a hearing but subject to judicial review does not violate due process.[10] It is reasoned that the operation of a motor

[6] Annot., 35 A.L.R.2d 1011 (1954) (Validity of motor vehicle financial responsibility act).

[7] *Ex parte* Lindley, 108 Cal. App. 258, 291 Pac. 638 (1930) (Apparently discredited in Watson v. State Div. of Motor Vehicles, 212 Cal. 279, 298 Pac. 481 (1931); Rosenblum v. Griffin, 89 N.H. 314, 197 Atl. 701 (1938) in which a provision to the effect that if there was a mortgage or lien on the motor vehicle or any sum due on the purchase price, the owner must furnish proof of financial responsibility before the vehicle might be registered, was held unconstitutional as an arbitrary discrimination.

[8] Annot., 35 A.L.R.2d 1011 (1954).

[9] People v. Nothaus, 363 P.2d 180, 182 (Colo. 1961).

[10] Escobedo v. State Dep't of Motor Vehicles, 35 Cal. 2d 870, 222 P.2d 1 (1950); Doyle v. Kahl, 242 Iowa 153, 46 N.W.2d 52 (1951); Ballow v. Reeves, 238 S.W.2d 141 (Ky. 1951); Sharp v. Department of Pub. Safety, 114 So. 2d 121 (La. 1959); Hadden v. Aitkin, 156 Neb. 215, 55 N.W.2d 620 (1952); Heart v. Fletcher, 184 Misc. 659, 53 N.Y.S.2d 369 (Sup. Ct. 1945); Commonwealth v. Koczwara, 78 Pa. D. & C. 6 (Dist. Ct. 1951); Gillaspie v. Department of Pub. Safety, 152 Tex. 459, 259 S.W.2d 177 (1953); Nulter v. State Rd. Comm'n, 119 W. Va. 312, 193 S.E. 549, 194 S.E. 270 (1937); State v. Stehlek, 262 Wis. 642, 56 N.W.2d 514 (1953). In Escobedo v. State Dep't of Motor Vehicles, *supra*, 222 P.2d at 5, the court said:

> Suspension of the license without prior hearing but subject to subsequent judicial review did not violate due process if reasonably justified by a compelling public interest . . . The compelling public interest here appears from the obvious carelessness and financial irresponsibility of a substantial number of drivers and from the following allegations of the petition: There are 3,879,931 motor vehicles registered in California. During the first four months after the effective date of the law now under consideration, 19,808 persons were ordered by the department to establish that they were adequately insured or deposit security. More than 6,567 operators' licenses were suspended under the applicable law, and more than 1,300 "citations per month for suspension of license" were issued by the department. In these circumstances it is apparent that to require a hearing in every case before suspension of a license would have substantially burdened and delayed if not defeated the operation of the law.

vehicle on the public highways is not a natural right, nor is license to do so a contract, or property right, in a constitutional sense. It is merely a conditional privilege which may be suspended or revoked under the police power, even without a notice or an opportunity to be heard.[11] In accepting a license from the state, one must also accept all reasonable conditions imposed by the state in granting the license.[12] Thus, suspending the privilege for failure to comply with reasonable regulations is not a denial of due process.[13] Also, since a driver's license and registration represent privileges and not property rights, regulation of them, their issuance, suspension, or cancellation may be committed to an administrative body or agency.[14] There is no denial of due process under such an agency where notice and hearing are dispensed with in connection with purely preliminary matters, and the right to judicial review, where reserved, may cure any lack of due process in the original administrative proceedings.[15]

As to the second ground relied on by the Colorado court, it has generally been recognized that financial responsibility laws constitute both reasonable regulations of the public highways and proper measures to protect the public safety.[16] Enactments such as the one involved here have been sustained under the police power and the compelling public interest of the states to provide some remedy for the uncompensated victims of auto accidents and thereby to protect the users of the highways and the general public affected by the extensive use of motor vehicles in this motorized age.[17]

The Colorado court distinguished their statute from those requiring public liability insurance as a condition to be met *before* a driver's

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[11] Nulter v. State Rd. Comm'n, *supra* note 10. In Doyle v. Kahl, *supra* note 10, 46 N.W.2d at 55, the court said in considering a contention that the suspension of the license without a hearing is depriving a person of his property without due process of law:

> The fallacy of this claim is that his so-called property right is not such in the ordinary sense. It is a privilege granted to him under certain specific conditions, subject to all laws pertaining thereto at the time the same is issued or may be later enacted, if otherwise valid.

[12] People v. Thompson, 259 Mich. 109, 242 N.W. 857 (1932).

[13] Ballow v. Reeves, 238 S.W.2d 141 (Ky. 1951).

[14] Gillaspie v. Department of Pub. Safety, 152 Tex. 459, 259 S.W.2d 177 (1953).

[15] Doyle v. Kahl, 242 Iowa 153, 46 N.W.2d 52, 55 (1951); 16A C.J.S. *Constitutional Law* § 628 (1956).

[16] Ballow v. Reeves, 238 S.W.2d 141 (Ky. 1951). In Rosenblum v. Griffin, 89 N.H. 314, 197 Atl. 701, 704 (1938), the court said:

> But protection in securing redress for injured highway travelers is a proper subject of police regulation, as well as protection from being injured. It is a reasonable incident of the general welfare that financially irresponsible persons be denied the use of the highway with their cars, regardless of the competency of themselves or others as the drivers.

[17] Sharp v. Department of Pub. Safety, 114 So. 2d 121, 123 (La. 1959). See generally Annot., 35 A.L.R.2d 1011, 1013 & n. 9 (1954).

license will issue, and said that the latter type protects the public.[18] However, if legislation requiring insurance or other security as a condition precedent to the right to operate a motor vehicle on the highway be valid, it would seem to follow that such compulsion may be limited to depend on contingencies such as involvement in an accident.[19]

Arizona has the Uniform Motor Vehicle Safety Responsibility Act[20] which contains a provision substantially similar to the Colorado statute herein involved.[21] Within the act are other provisions for hearings upon request of persons aggrieved by orders or acts of the superintendent and for a trial de novo in the superior court to determine whether the order or act is lawful and reasonable.[22] A further provision provides for the suspension of the license and registration of a person against whom a judgment was rendered if unpaid within sixty days except as provided by the statute.[23] This statute has been held constitutional in *State ex rel. Sullivan v. Price*.[24]

Unquestionably there is a need to protect the public from losses caused by financially irresponsible motorists by means within constitutional limitations. The widespread public acceptance of laws of the safety or financial responsibility type, as opposed to enactment of compulsory insurance requirements or statutes similar to workmen's com-

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[18] As to the Colorado statute, the court stated, "It is a device designated and intended to bring about the posting of security for the payment of a private obligation without the slightest indication that any legal obligation exists on the part of any person. The public gets no protection whatever from the deposit of such security." People v. Nothaus, 363 P.2d 180, 183 (Colo. 1961). Generally however, there is no violation of due process even though there is a failure in the statute to require a showing of negligence prior to suspension of the license. In Ballow v. Reeves, 238 S.W.2d 141, 142 (Ky. 1951), the court said:

> The question of negligence has nothing to do with the matter. The requirement of financial responsibility does not in any sense pre-determine the question of liability, which could only be decided in a judicial proceeding. It simply furnishes an added protection to the public and better assures the safety of our highways and is not dependent upon the operator's skill or lack of it.

[19] People v. Nothaus, *supra* note 18 (dissenting opinion). See Ballow v. Reeves, *supra* note 18.

[20] The act is based on the Uniform Motor Vehicle Safety Responsibility Act, promulgated by the National Conference on Street and Highway Safety.

[21] ARIZ. REV. STAT. ANN. § 28-1142(A) (1956).

> The superintendent shall, within sixty days after the receipt of a report of a motor vehicle accident within this state which resulted in bodily injury or death or damage to the property of any one person in excess of one hundred dollars, suspend the license of each operator and all registrations of each owner of a motor vehicle in any manner involved in such accident, . . . unless such operator or owner or both shall deposit security in a sum which is sufficient in the judgment of the superintendent to satisfy any judgment or judgments for damages resulting from the accident as may be recovered against the operator or owner. . . .

[22] ARIZ. REV. STAT. ANN. § 28-1122 (1956).

[23] ARIZ. REV. STAT. ANN. § 28-1162 (1956).

[24] 49 Ariz. 19, 63 P.2d 653 (1937) held that ARIZ. CODE 1928, § 1664, depriving a motorist of the right to operate an automobile for nonpayment of a personal injury or property damage judgment, was not unconstitutional, and it was held not so vague, indefinite, and uncertain as to be unenforceable.

pensation laws, seems to evidence a public policy to the effect that it is socially desirable for motorists to be financially responsible, but a legislative reluctance to impose a positive requirement that all motorists show their ability to respond in damages before being permitted to drive on a public highway.[25] While the safety responsibility type of measure theoretically is a less perfect solution to the problem than the other proposed methods, practically, under effective administration, there may be an increase in the number of financially responsible motorists and a reduction of instances of hardship occasioned by irresponsible motorists.[26]

In view of the uniformity of the courts in upholding various types of financial responsibility laws, the majority of the Colorado court, with no citation of authority, took a bold step in finding their statute unconstitutional, requiring a return of the licenses to all those financially irresponsible individuals who already have had their licenses suspended under the statute.[27] It is significant that the court found itself dealing with a right, rather than a mere privilege, around which should be placed the same safeguards given to other constitutionally guaranteed rights and which cannot be withdrawn summarily, but only by due process of law.[28]

Jerry L. Jacobs

CONSTITUTIONAL LAW—DOUBLE JEOPARDY—FIRST DEGREE MURDER TRIAL AFTER REVERSAL OF MANSLAUGHTER CONVICTION.—The defendant was charged with first degree murder and convicted of manslaughter; on appeal the conviction was reversed and a new trial ordered. On trial de novo, the defendant moved to quash the first degree charge claiming double jeopardy. The trial court certified the question to determine if the defendant was placed twice in jeopardy. On certification,[1] *held*, no. Where the defendant has been convicted of manslaughter under an information charging first degree murder and the conviction has been reversed on appeal, a new trial for first degree murder would not place the defendant twice in jeopardy. *State v. Thomas*, 88 Ariz. 269, 356 P.2d 20 (1960).

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[25] 19 BROOKLYN L. REV. 11 (1953).
[26] *Ibid.* See generally 1953 INS. L.J. 758.
[27] Nothaus v. Theobald, 363 P.2d 184 (Colo. 1961).
[28] See generally 30 N.C.L. REV. 27 (1951). *But see* 46 IOWA L. REV. 862 (1961).

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[1] For the text of the certified question, see State v. Thomas, 88 Ariz. 269, 356 P.2d 20 (1960).

The courts that have considered the question raised by the *Thomas* case present conflicting views. At present, the numerical majority of the jurisdictions hold that the second trial for the greater offense, after the reversal of the conviction of the lesser included offense, places the defendant twice in jeopardy.[2] They reason that the verdict finding the defendant guilty of the lesser offense carries an implied acquittal of the greater offense and that this acquittal acts as a bar to a retrial for the greater offense.[3] The defendant's appeal is only from the conviction[4] and a reversal of the conviction does not affect the acquittal.[5] Slightly fewer jurisdictions hold that the second trial for the greater offense does not place the defendant twice in jeopardy, reasoning that when the defendant appeals from the conviction he waives his right to assert the plea of former jeopardy.[6] The verdict, it is held, is a unit and not severable,[7] and when reversed any implication based on it must fall.[8] Therefore, the case may be tried anew as if there

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[2] Green v. United States, 355 U.S. 184 (1957); Brewington v. State, 19 Ala. App. 409, 97 So. 763 (1923); United States v. Owens, 2 Alaska 480 (1905); Hearn v. State, 212 Ark. 360, 205 S.W.2d 477 (1947); Gomez v. Superior Court, 50 Cal. 2d 640, 328 P.2d 976 (1958); State v. Naylor, 28 Del. 99, 90 Atl. 880 (1913); West v. State, 55 Fla. 200, 46 So. 93 (1908); People v. Carrico, 310 Ill. 543, 142 N.E. 164 (1923); State v. Smith, 132 Iowa 645, 109 N.W. 115 (1906); State v. Elmore, 179 La. 1057, 155 So. 896 (1934); People v. Farrell, 146 Mich. 264, 109 N.W. 440 (1906); State v. Williams, 30 N.J. 105, 152 A.2d 9 (1959); State v. White, 61 N.M. 109, 295 P.2d 1019 (1956); State v. Steeves, 29 Ore. 85, 43 Pac. 947 (1896); Commonwealth v. Alessio, 313 Pa. 537, 169 Atl. 764 (1934); Reagan v. State, 155 Tenn. 397, 293 S.W. 755 (1927); Bateman v. Commonwealth, 183 Va. 253, 32 S.E.2d 134 (1944); State v. Schoel, 54 Wash. 2d 388, 341 P.2d 481 (1959); State v. Vineyard, 85 W. Va. 293, 101 S.E. 440 (1919); Montgomery v. State, 136 Wis. 119, 116 N.W. 876 (1908).

[3] *E.g.*, Green v. United States, 355 U.S. 184, 190 (1957); Johnson v. State, 27 Fla. 245, 9 So. 208, 210 (1891); Commonwealth v. Deitrick, 221 Pa. 7, 70 Atl. 275 (1908); State v. Schoel, 54 Wash. 2d 388, 341 P.2d 481, 484 (1959).

[4] *E.g.*, Johnson v. State, *supra* note 3; Barnett v. People, 54 Ill. 325, 331 (1870); People v. Dowling, 84 N.Y. 478, 483 (1881).

[5] *E.g.*, State v. Harville, 171 La. 256, 130 So. 348, 350 (1930); State v. Norvell, 10 Tenn. 24, 27 (1820); see 6 U.C.L.A.L. REV. 321 (1959).

[6] United States v. Frank, 8 Alaska 436 (1933) (This case might not be valid authority in Alaska today as it was decided in reliance on Trono v. United States, 199 U.S. 521 (1905) which was overruled by Green v. United States, 355 U.S. 184 (1957)); State v. Thomas, 88 Ariz. 269, 356 P.2d 20 (1960); Young v. People, 54 Colo. 293, 130 Pac. 1011 (1913); Perdue v. State, 134 Ga. 300, 67 S.E. 810 (1910); State *ex rel.* Lopez v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931); State v. Morrison, 67 Kan. 144, 72 Pac. 554 (1903); Hoskins v. Commonwealth, 152 Ky. 805, 154 S.W. 919 (1913); Jones v. State, 144 Miss. 52, 109 So. 265 (1926); State v. Stallings, 334 Mo. 1, 64 S.W.2d 643 (1933); State v. Hutter, 145 Neb. 798, 18 N.W.2d 203 (1945); Gibson v. Somers, 31 Nev. 531, 103 Pac. 1073 (1909); People v. McGrath, 202 N.Y. 445, 96 N.E. 92 (1911); State v. Correll, 229 N.C. 640, 50 S.E.2d 717 (1948); State v. Robinson, 100 Ohio App. 466, 137 N.E.2d 141 (1956); Hamit v. State, 42 Okla. Crim. 168, 275 Pac. 361 (1929); State v. Gillis, 73 S.C. 318, 53 S.E. 487 (1906); State v. Kessler, 15 Utah 142, 49 Pac. 293 (1897); State v. Bradley, 67 Vt. 465, 32 Atl. 238 (1895).

[7] *E.g.*, Brantley v. State, 132 Ga. 573, 64 S.E. 676, 677 (1909); State v. Kessler, 15 Utah 142, 49 Pac. 293, 294 (1897).

[8] *E.g.*, Young v. People, 54 Colo. 293, 130 Pac. 1011, 1014 (1913); State v. Kessler, *supra* note 7, at 294, 295.

had been no former trial.[9]

The leading case supporting the numerical majority view is a 1957 United States Supreme Court decision, *Green v. United States*,[10] in which the defendant was convicted of first degree murder on a second trial after a previous conviction of second degree murder had been reversed on his appeal. The Court held that the second trial for first degree murder placed the defendant twice in jeopardy within the meaning of the fifth amendment of the Federal Constitution, reasoning that the conviction of the lesser offense on the first trial carried an implicit acquittal as to the greater offense. When the defendant appealed, he did not waive his right to assert the formar acquittal as a bar to a second trial for the greater offense.[11]

The basic conflict presented by these authorities involves two points; first, the interpretation to be given to the term "double jeopardy" and second, the balancing of the interests of the state against the rights of the accused.[12] Jurisdictions not allowing the second trial for the greater offense after the conviction of the lesser included offense is reversed interpret the term strictly and emphasize the rights of the defendant, in not having his life placed twice in jeopardy, over the interests of the state.[13] While the jurisdictions allowing the second trial interpret the term liberally and emphasize the interests of the state, in securing adequate punishment of criminals, over the rights of the defendant.[14]

In its decision, in the instant case, to allow the second trial for murder after the conviction of manslaughter had been reversed, the Arizona Supreme Court placed great weight on Rule 314 of the Rules of Criminal Procedure[15] which provides for the new trial to be in all respects as if no former trial had been had. This rule has been in effect in Arizona since 1864,[16] but the *Thomas* case is the first instance in which it has been given judicial construction in this situation.[17] The court also relied heavily on its decision in *Territory v. Dor-*

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[9] *E.g.*, State v. Thomas, 88 Ariz. 269, 356 P.2d 20 (1960); Young v. People, *supra* note 8; People v. McGrath, 202 N.Y. 445, 96 N.E. 92, 94 (1911).

[10] 355 U.S. 184 (1957).

[11] *Ibid.*; see 32 TUL. L. REV. 488 (1958).

[12] See 6 U.C.L.A.L. REV. 321 (1959).

[13] See Green v. United States, 355 U.S. 184, 189 (1957); 56 MICH. L. REV. 1192, 1193 (1958).

[14] See People v. Palmer, 109 N.Y. 413, 17 N.E. 213 (1888).

[15] ARIZ. R. CRIM. P. 314 provides:

When a new trial is granted, the new trial shall proceed in add respects as if no former trial had been had. On the new trial the defendant may be convicted of any offense charged in the indictment or information regardless of the verdict or finding on the former trial. The former verdict or finding shall not be used or referred to in evidence or argument on the new trial.

[16] Comp. Laws of Ariz., ch. XI, §§ 408, 414 (1864).

[17] This rule was adopted verbatim from California and has been consistently construed by the courts of that state, both before and after its adoption by Ari-

man,[18] a case concerning the fifth amendment of the Federal Constitution, in which it was held that a defendant was not twice placed in jeopardy by a new trial for the same offense after his former conviction for that offense had been reversed on his appeal.[19] The court, in light of the *Dorman* decision and the long standing existence of Rule 314, held the rule to be constitutional and approved its decision in the *Dorman* case.[20]

In a first degree murder trial in Arizona, the jury is instructed as to both degrees of murder and as to manslaughter[21] and a verdict finding the defendant guilty of manslaughter necessarily involves an implied acquittal of both degrees of murder.[22] But this acquittal will be of no avail to the defendant in Arizona, under the doctrine of the *Thomas* case, if he exercises his constitutional right of appeal[23] from the verdict convicting him of the lesser offense of manslaughter. Under Rule 314, if his appeal is successful, he will once again be subject to the possibility of being convicted of that offense of which he has been acquitted. Hence, by his exercise of one constitutional right, he is denied the benefit of another constitutional right.[24]

Even though, as the Arizona court noted,[25] it was not bound by the interpretation of the double jeopardy provision of the fifth amendment to the Federal Constitution, as stated by the United States Supreme Court in the *Green* case,[26] the trend in the state courts since that decision has been to hold that the second trial for the greater offense places the defendant twice in jeopardy.[27]

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zona, as not allowing the defendant to be twice tried for the greater offense. *E.g.*, Gomez v. Superior Court, 50 Cal. 2d 640, 328 P.2d 976 (1958); People v. McFarlane, 138 Cal. 481, 71 Pac. 568 (1903); People v. Gordon, 99 Cal. 227, 33 Pac. 901 (1893).

[18] 1 Ariz. 56, 25 Pac. 516 (1872).

[19] *Ibid.*

[20] State v. Thomas, 88 Ariz. 269, 356 P.2d 20 (1960).

[21] *Accord*, Antone v. State, 49 Ariz. 168, 65 P.2d 646 (1937); Miranda v. State, 42 Ariz. 358, 26 P.2d 241 (1933).

[22] See 56 MICH. L. REV. 1192 (1958).

[23] ARIZ. CONST. art. 2, § 24.

[24] Defendants claim of double jeopardy, in the instant case, was based on ARIZ. REV. STAT. ANN. § 13-145 (1956), which has its constitutional basis in ARIZ. CONST. art. 2, § 10. See 19 OHIO ST. L. J. 511 (1958).

[25] State v. Thomas, 88 Ariz. 269, 356 P.2d 20 (1960).

[26] *Supra* note 11.

[27] In light of the *Freen* decision, California and Washington have overruled previous precedent and now hold the second trial to constitute double jeopardy. Gomez v. Superior Court, 50 Cal. 2d 640, 328 P.2d 976 (1958); State v. Schoel, 54 Wash. 2d 388, 341 P.2d 481 (1959). New Jersey, with no previous precedent, held in accord with the *Green* decision. State v. Williams, 30 N.J. 105, 152 A.2d 9 (1959). Kentucky and New York, following previous decisions, continue to hold contrary to *Green*. Blanton v. Commonwealth, 320 S.W.2d 626 (Ky. 1959); People *ex rel.* Hetenyi v. Johnson, 10 App. Div. 2d 121, 198 N.Y.S.2d 18 (1960). Arizona is the only jurisdiction, with no previous precedent, to decide contrary to the *Green* case since that decision was announced. State v. Thomas, 88 Ariz. 269, 356 P.2d 20 (1960).

CONSTITUTIONAL LAW — SEARCH AND SEIZURE — ADMISSIBILITY IN STATE COURTS OF EVIDENCE OBTAINED THROUGH UNCONSTITUTIONAL SEARCH AND SEIZURE.—The defendant was found guilty of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures and photographs in violation of an Ohio Statute.[1] The conviction was based primarily upon evidence seized during an unlawful search of the defendant's home. The Ohio Supreme Court affirmed the conviction.[2] On appeal, *held*, reversed. Evidence obtained through an unconstitutional search and seizure by state and local police is inadmissible in a state court. *Mapp v. Ohio*, 367 U.S. 643 (1961).

The path leading toward the principle enunciated above has been a rather slow and painstaking one. The common-law rule was that the illegality of the means by which evidence was procured was not a ground of objection to its admission, for such an issue was collateral to those on trial.[3] Although the earliest federal case promulgating the exclusionary rule was based on the self-incrimination provisions of the fifth amendment of the United States Constitution,[4] the leading case adopting the federal exclusionary rule was *Weeks v. United States*,[5] which found the rule a logical sanction of the fourth amendment.[6] In 1949, the Court was asked in *Wolf v. Colorado*,[7] to extend the exclusionary rule to state courts. The Court[8] found that the guarantee of the fourth amendment — security of one's privacy against arbitrary intrusion by the police — is a basic right in a free society, implicit in the "concept of ordered liberty,"[9] and therefore enforceable against the states through the Due Process Clause of the fourteenth amendment. However the majority of the Court found that the exclusionary rule was not an essential ingredient of this fourth amendment right, but a judicially created rule to enforce it, and therefore the states should be allowed to protect that right under the fourteenth amendment by remedies of their choice.

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[1] OHIO REV. CODE § 2905.34 (Anderson 1953).
[2] 170 Ohio St. 427, 166 N.E.2d 387 (1960).
[3] MCCORMICK, EVIDENCE 291 (1954).
[4] Boyd v. United States, 116 U.S. 616 (1886).
[5] 232 U.S. 383 (1914).
[6] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." U. S. CONST., amend. IV.
[7] 338 U.S. 25 (1949).
[8] All of the nine justices agreed with this reasoning although Justice Rutledge in his dissent also referred to the interaction of the fourth and fifth amendments as justifying the conclusion.
[9] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

In overruling *Wolf*, the Court stated that it was led by "Wolf's constitutional documentation of the right of privacy free from unreasonable state intrusion, . . . to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right. . . ."[10] Four of the majority judges[11] found the exclusionary rule announced in *Weeks* to be an essential ingredient of the right of the fourth amendment, reasoning that otherwise the assurance against unreasonable federal seizure would be a "form of words,"[12] without means of enforcement. Having drawn this conclusion which the Court in *Wolf* had refused to do, the Court then went on to use the constitutional reasoning in *Wolf* in finding it logically necessary that the *Weeks* exclusionary rule be enforced against the states.

The minority[13] in their reasoning assumed, without agreeing with the majority, that the exclusionary rule was a constitutional requirement of the fourth amendment. They argued that what was recognized in *Wolf* was not that the fourth amendment *as such* is enforceable against the states as a facet of due process but the principal of privacy, which is at the core of the fourth amendment,[14] and that

[10] Mapp v. Ohio, 367 U.S. 643 (1961). The exclusionary rule in *Weeks* was limited to evidence gained unconstitutionally by federal officers to be used in the federal courts. This limitation was responsible for the "silver platter" doctrine which allowed the use in the federal courts of evidence gained illegally through the actions of state or local officers exclusively and then turned over to federal officials. See, *e.g.*, Byars v. United States, 273 U.S. 28 (1927), and the naming of the doctrine in Lustig v. United States, 338 U.S. 74 (1949). The "silver platter" doctrine was overruled in Elkins v. United States, 364 U.S. 206 (1960).

The exclusionary rule was further extended in Rea v. United States, 350 U.S. 214 (1956), which formulated a method whereby a federal agent could be enjoined from testifying in a state case. *But see* Wilson v. Schnettler, 365 U.S. 381 (1961).

[11] The majority opinion was written by Justice Clark joined by Justices Brennan, Douglas and Warren. Justice Black concurred with the majority but rejected the idea, as he had done in *Wolf*, that the fourth amendment, of itself, constitutionally justifies the exclusionary rule. However he argued that "[T]he Fourth Amendment's ban against unreasonable searches and seizures . . . considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." Mapp v. Ohio, *supra* note 10. Therefore, as the minority pointed out, the case was in fact an opinion only for the judgment overruling *Wolf* and not for the basic rationale.

[12] Silverthone Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

[13] The minority opinion was written by Justice Harlan joined by Justice Frankfurter (who had written the *Wolf* majority opinion), and by Justice Whitaker. Justice Stewart wrote a memorandum in which he chose not to express any views on the constitutional issues decided but he agreed with the minority judges that the Court had "reached out" to overrule *Wolf*, for the question of the constitutionality of the Ohio Statute upon which the conviction was based was an easier and more pivotal issue upon which the reversal could have been justified.

[14] "It would not be proper to expect or impose any precise equivalence, either as regards the scope of the right or the means of its implementation, between the requirements of the Fourth and Fourteenth Amendments. For the Fourth, unlike what was said in Wolf of the Fourteenth, does not state a general principle only; it is a particular command, having its setting in a pre-existing legal context on which both interpreting decisions and enabling statutes must at least build." Mapp v. Ohio, 367 U.S. 643 (1961) (dissent).

violations of the fourth amendment are not necessarily violations of the fourteenth.[15] They concluded that the majority was not only forcing the federal standards of search and seizure upon the states but also the basic federal remedy for violation of those standards.

Aside from the strict constitutional issues, the arguments surrounding the exclusionary rule mark a clash between individual privacy and public security. Those against the rule argue that there are other methods to enforce fourth amendment rights such as the traditional civil action for trespass or a criminal prosecution,[16] and since problems of criminal law enforcement vary widely from state to state, adamant national rules in this area are undesirable.[17]

The proponents of the exclusionary rule contend that the alternative remedies have been ineffective to afford proper protection to the rights of the private citizen, as the incentive to disregard the right is still present.[18] It is argued that the new rule eliminates a double standard in the federal and state courts which has caused conflict between them and it promotes judicial integrity although on occasion the criminal does go free.[19] They reject the argument that the rule fetters law enforcement, citing the experience of the Federal Bureau of Investigation which has operated within the exclusionary rule since 1914, and instead show the efficacy of the rule in promoting fair police methods in the states adopting the rule.[20]

Because of the restriction of the exclusionary rule in the *Weeks* and *Wolf* cases to the federal courts, the states have been allowed to devise their own remedies to enforce the right of privacy, usually a requirement of the state constitution[21] as well as that of the federal. When *Wolf* was considered, approximately two-thirds of the states had adopted the common-law rule,[22] but that number had been reduced to approximately one-half when the *Mapp* case was decided.[23] The *Mapp* case changes the rule in Arizona which had followed the

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[15] See Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959), rejecting this reasoning as the basis for the *Wolf* decision.

[16] In State v. Frye, 58 Ariz. 409, 120 P.2d 793 (1942), another remedy suggested was that if the violation was intentional and the court had jurisdiction over the officer, they could hold him in contempt.

[17] Mapp v. Ohio, 367 U.S. 643 (1961) (dissent). The argument against the rule is embodied in Justice (then Judge) Cardozo's words: "The criminal is to go free because the constable has blundered." People v. Defore, 242 N.Y. 13, 150 N.E. 585, 587 (1926).

[18] Wolf v. Colorado, 338 U.S. 25, 42 (1949) (dissent); People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

[19] Mapp v. Ohio, 367 U.S. 643 (1961).

[20] Wolf v. Colorado, 338 U.S. 25, 44 (1949) (dissent).

[21] See, *e.g.*, ARIZ. CONST. art. 2, § 8.

[22] Wolf v. Colorado, 338 U.S. 25, 29, 33-39 (1949).

[23] See 8 WIGMORE, EVIDENCE § 2183 n.1 (McNaughton rev. 1961).

common-law. In *State v. Frye*,[24] the court considered the question one of first impression[25] and in a well documented opinion rejected the exclusionary rule.[26]

Now that the Arizona law on the subject has been changed, one of the immediate concerns of defense lawyers is the procedure to use in order to take advantage of the exclusion privilege. The Federal courts,[27] and the state courts, with a few exceptions,[28] require the accused to make timely motion before the trial to have the evidence excluded, as the court cannot stop to try collateral issues.[29] However, if the accused has no notice of such illegally obtained evidence until it is offered at his trial, justice requires it to be excluded upon proper motion.[30] Until the Arizona Supreme Court rules on this matter, it would seem that the wisest approach for the defense lawyer, in order to avoid waiving this newly won privilege, would be to raise the issue in a pretrial motion.[31]

Neal Kurn

CRIMINAL LAW—HOMICIDE—YEAR AND A DAY RULE ABANDONED.—The defendant was indicted for criminal homicide and manslaughter. His motions to quash the indictments on the basis of the common law year and a day rule were denied. On appeal, *held*, affirmed.—The common law rule, that no one is responsible for a homicide when death ensues beyond a year and a day after the assault, is not part of the definition of murder, but only a rule of evidence which may be abrogated. *Commonwealth v. Ladd*, 402 Pa. 164, 166 A.2d 501 (1960).

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[24] 58 Ariz. 409, 120 P.2d 793 (1942).

[25] The issue had been raised but not answered in Thompson v. State, 41 Ariz. 167, 16 P.2d 727 (1932), and Malmin v. State, 30 Ariz. 258, 246 Pac. 548 (1926). See, also, Argetakis v. State, 24 Ariz. 599, 212 Pac. 372 (1923) (dictum).

[26] The rule has been followed in Jaroshuk v. United States. 201 F.2d 52 (1953); State v. Thomas, 78 Ariz. 52, 275 P.2d 408 (1954); Adams v. Bolin, 74 Ariz. 269, 247 P.2d 617 (1952); State v. Pelosi, 68 Ariz. 51, 199 P.2d 125 (1948).

[27] Cogen v. United States, 278 U.S. 221 (1929); FED. R. CRIM. P. 41(e).

[28] See Annot., 50 A.L.R.2d 531 § 11 (1956).

[29] This procedure was suggested as the proper method to follow in the dictum of the following Arizona cases: State v. Pelosi, 68 Ariz. 51, 199 P.2d 125 (1948), and Thompson v. State, 41 Ariz. 167, 16 P.2d 727 (1932).

[30] Gouled v. United States, 255 U.S. 298 (1921).

[31] In People v. Du Bois (N.Y. County Ct. 1961), the court was faced with the same problem; the *Mapp* case had changed the state law and the procedure to take advantage of the change had not yet been established. The court expressed a belief that it would be ". . . better to assimilate our practice to that employed in the Federal Courts and have the question determined in advance of trial."

The year and a day rule originated 700 years ago in the *Statutes* of *Gloucester*,[1] and has become well established in the common law.[2] The rule is prevalent throughout the United States in the absence of statute abrogating the common law.[3] Some states have incorporated the year and a day rule into their statutory definition of murder,[4] while others retain the common law rule as a supplement to their statutory definition.[5]

Assuming the rule to be one of evidence, testimony should be refused that the victim died of the injury received if death did not occur within a year and a day from the assault.[6] The courts reason that there would be a conclusive presumption that the victim died of some other cause.[7] This conclusive presumption is sometimes criticized, because of the absurdity of saying that a malicious murder should be deemed a guilty or harmless act according to the length of time a victim survives after receiving a mortal wound.[8] On the other hand, two principle reasons have been advanced in support of the rule. (1) There exists a problem of proof because of limited scientific and medical knowledge;[9] (2) There should be a time limit on the persecution of the person committing the injury.[10]

Every state which has considered the year and a day rule has upheld it with the exception of New York[11] and Pennsylvania.[12] New

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[1] *Statute* of *Gloucester*, 1278, 6 Edw. 1, c. 9 (repealed).

[2] Elliott v. Mills, 335 P.2d 1104, 1108 (Okla. 1959) (dictum); 4 BLACKSTONE, *Commentaries* 195, 197 (1769); 9 HALSBURY, LAWS OF ENGLAND 428, § 734 (Hailsham ed. 1933); 1 HAWKINS, PLEAS OF THE CROWN 93, Ch. 13, § 9 (Curwood ed. 1824); PERKINS, CRIMINAL LAW 605 (1957).

[3] Louisville E. & St. L. R.R. v. Clarke, 152 U.S. 230 (1894); People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934); People v. Legeri, 266 N.Y. Supp. 86 (App. Div. 1933); Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960).

[4] Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960). They are: Arizona, Arkansas, California, Colorado, Delaware, Idaho, Illinois, Missouri, Nevada, North Dakota and Utah.

[5] Hardin v. State, 4 Tex. Ct. App. R. 355 (1878).

[6] People v. Clark, 106 Cal. App. 2d 271, 236 P.2d 56 (1951).

[7] State v. Orrel, 12 N.C. 120, 17 Am. Dec. 563 (1826).

[8] State v. Huff, 11 Nev. 17 (1876).

[9] Louisville E. & St. L. R.R. v. Clarke, 152 U.S. 230, 239 (1894) (dictum), citing 3 COKE, INSTITUTES 53 (2d ed. 1648):

"The reason assigned for that rule was that if the person alleged to have been murdered dies after that time, it cannot be discerned, as the law presumes, whether he died of a stroke or poison, etc., or a natural death, and in case of life, a rule of law ought to be certain." *Contra*, People v. Legeri, 266 N.Y. Supp. 86, 88 (App. Div. 1933): "Great advances have been made in medicine and surgery, and the doubt that the blow was the cause of death, when the latter ensued a year and a day after the former, has, in a large measure, been removed."

[10] Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501, 519 (1960) (dissenting opinion): "The majority is content to open a Pandora's box of interrogation and let it remain unclosed, to the torment and possible persecution of every person who may at one time or another injure another."

[11] People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934); People v. Legeri, 266 N.Y. Supp. 86 (App. Div. 1933).

[12] Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960).

York has taken the view that when the legislature adopted a statutory definition of murder, this showed an intent to abrogate the common law rule.[13] Pennsylvania not having New York's statutory definition of murder, adopted Blackstone's definition,[14] which according to the court in *Commonwealth v. Ladd,* lacks the year and a day rule.[15] Thus, since the rule was not part of the substantive law of Pennsylvania, but merely a rule of evidence, it could be abolished.[16]

A concurring opinion in *Commonwealth v. Ladd* took the view that the rule at English common law was substantive, and not a rule of evidence, but that it was never adopted as part of the common law of Pennsylvania. "[O]n the contrary numerous decisions of this court by their definitions of 'murder' clearly negate the existence of any such rule."[17]

A vigorous dissent[18] reasoned that since Pennsylvania adopted the common law of England by statute,[19] and has never abrogated the common law by appropriate legislation, the year and a day rule should still have effect in Pennsylvania.[20] In support of this reasoning it has been suggested that if the rule is to be abolished, it must be done by the legislature.[21]

Arizona has solved the problem of the year and a day rule by including it in their statutory definition of murder.[22] This does not take into consideration the modern lack of necessity for the rule, although it does stop possible litigation.[23] In most cases scientific and medical knowledge is now capable of determining the cause of death,[24] and the defendant is always protected by the requirement that the prosecution must establish beyond a reasonable doubt that the act of the defendant proximately caused the death of the victim.[25] It is submitted that Arizona should re-evaluate the reasons for the rule with a view toward abolishing it by legislation.

Chris T. Johnson

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[13] People v. Legeri, 266 N.Y. Supp. 86 (App. Div. 1933).
[14] BLACKSTONE, *supra* note 2, at 195.
[15] Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).
[16] Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960). *Contra* 10 WIS. L. REV. 112, 114 (1934): "It would seem that the shadowy cloak of a legislative intention used by the New York court could not be used in any state without a similarly exclusive penal code."
[17] Commonwealth v. Ladd, 166 A.2d 501, 507 (Pa. 1961) (concurring opinion).
[18] *Id.* at 512 (dissenting opinion).
[19] 46 P.S. § 152 (1777).
[20] Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960) (dissenting opinion).
[21] Head v. State, 68 Ga. App. 759, 24 S.E. 2d 145 (1943); Elliot v. Mills, 335 P.2d 1104 (Okla. 1959); 46 IOWA L. REV. 883, 888 (1961).
[22] ARIZ. REV. STAT. § 13-458 (1956): "For the killing of a human being to constitute either murder or manslaughter, it is requisite that the party dies within a year and a day after the stroke received, or the cause of death administered."
[23] People v. Legeri, 266 N.Y. Supp. 86 (App. Div. 1933).
[24] Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960).
[25] People v. Brengard, 265 N.Y. 100, 191 N.E. 850 (1934).

MUNICIPAL CORPORATIONS—BUILDING CODES—NOT APPLICABLE TO STATE UNIVERSITY BUILDINGS.—The Board of Regents failed to comply with municipal building regulations in the construction of university buildings located within the city. Faced with a stop order served by the city, the board sought injunctive relief which was denied by the superior court. On appeal, *held,* reversed. Municipal building codes are not applicable to the construction and maintenance of state university buildings located within the municipality. *Board of Regents of Universities and State College v. City of Tempe,* 88 Ariz. 299, 356 P.2d 399 (1960).

The general rule seems to be that state buildings are not subject to municipal building regulations.[1] The state may waive the right to regulate its own property, but the waiver will not be presumed.[2] The applicability of municipal building codes to a state university has not previously been reported;[3] but the question has been decided in the analagous cases of a state Institution for Education of the Blind,[4] the Board of Regents of a state normal school,[5] and local school boards.[6] In all of the preceding cases, the public buildings were held immune from municipal building regulations. Contrariwise, other courts have held such regulations applicable to a couny jail[7] and local school

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[1] Davidson County v. Harmon, 200 Tenn. 575, 292 S.W.2d 777 (1956); City of Charleston v. Southeastern Const. Co., 134 W. Va. 666, 64 S.E.2d 676 (1951); City of Milwaukee v. McGregor, 140 Wis. 35, 121 N.W. 642 (1909); RHYNE, MUNICIPAL LAW 306 (1957); YOKLEY, MUNICIPAL CORPORATIONS § 136 (1956); 49 AM. JUR. *States, Territories and Dependencies* § 56 (1943).

[2] Kentucky Institution for Educ. of Blind v. City of Louisville, 123 Ky. 767, 97 S.W. 402 (1906); 62 C.J.S. *Municipal Corporations* § 157 (1949). At least this is the formal, majority view. But see Kansas City v. School Dist. of Kansas City, 356 Mo. 364, 201 S.W.2d 930, 934 (1947), in which the court came close to presuming a waiver:

> Since the State itself has taken no precautionary measures, and City has been vested with the regulatory and supervisory responsibilities of the exercise of the police power, and School District (having no police power) has not been expressly and specifically given full duty to attend to these responsibilities, we think the Legislature is content in the thought the measures to be taken are within the police power vested in the City.

[3] Municipal regulation of state university buildings has no doubt been at issue before, but no previous case has apparently been adjudicated by the highest tribunal of a state, or other court covered by the reporter systems. A search of the various law indexes reveals none, and neither appellant nor appellee produced such a citation. See Brief for Appellant, Reply Brief for Appellant, and Brief for Appellee, Board of Regents v. City of Tempe, 88 Ariz. 299, 356 P.2d 399 (1960).

[4] Kentucky Institution for Educ. of Blind v. City of Louisville, 123 Ky. 767, 97 S.W. 402 (1906).

[5] City of Milwaukee v. McGregor, 140 Wis. 35, 121 N.W. 642 (1909).

[6] Hall v. City of Taft, 47 Cal. 2d 177, 302 P.2d 574 (1956); Board of Educ. of the City of St. Louis v. City of St. Louis, 267 Mo. 356, 184 S.W. 975 (1916); Kaveny v. Board of Comm'rs, 173 A.2d 536 (N.J. 1961), decided subsequent to, and cites, principal case; Salt Lake City v. Board of Educ., 52 Utah 540, 175 P. 654 (1918).

[7] Cook County v. City of Chicago, 311 Ill. 234, 142 N.E. 512 (1924).

construction.[8] The Arizona court has not previously considered the status of municipal building codes with respect to state buildings, although it has held that a state university is an agency of the state.[9]

Interpretation of existing statutes has been an element in all of the building code decisions, in both majority and minority courts; and no consistent rule governing the kind of statutory authorization necessary to uphold municipal regulation of state buildings has been followed. Some courts have expressly taken the far-reaching position that municipal building codes are not applicable in the absence of specific legislative authorization.[10] Other decisions rest on the assumption that the courts are free to uphold reasonable and beneficial regulation in the absence of legislative expression on the issue.[11] McQuillan takes the latter to be the general view with respect to public schools, unless regulation is precluded by specific legislative delegation of the authority to the local school board.[12] Yokley assumes a similar position.[13] So broad a generalization does not appear to be warranted by the precedents, however. In a number of decisions denying municipalities the right to regulate state buildings, the issue does not emerge clearly because the relevant statutes were explicit.[14]

In the instant case neither party claimed that the state legislature had expressly settled the matter of jurisdiction.[15] If the absence of express authority to regulate state buildings were determinative, as the court seemed to feel in *Hall v. City of Taft*,[16] the city had no case. The Arizona court did not explicity adopt this position, although

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[8] Lavender v. City of Rogers, 339 S.W.2d 598 (Ark. 1960); Pasadena School Dist. v. City of Pasadena, 166 Cal. 7, 134 Pac. 985 (1913); Cedar Rapids Community School Dist. v. City of Cedar Rapids, 106 N.W.2d 655 (Iowa 1960); Kansas City v. School Dist. of Kansas City, 356 Mo. 364, 201 S.W.2d 930 (1947).

[9] State v. Miser, 50 Ariz. 244, 70 P.2d 408 (1937) (Applicability of minimum wage law). *Cf.* Board of Regents v. Sullivan, 45 Ariz. 245, 42 P.2d 619 (1935) (Limitation upon power of state to contract debts).

[10] See, *e.g.*, Hall v. Taft, 47 Cal. 2d 177, 302 P.2d 574 (1956); Kentucky Institution for Educ. of Blind v. City of Louisville, 123 Ky. 767, 97 S.W. 402 (1906); Davidson County v. Harmon, 200 Tenn. 575, 292 S.W.2d 777 (1956).

[11] Lavender v. City of Rogers, 389 S.W.2d 598 (Ark. 1960); Pasadena School Dist. v. City of Pasadena, 166 Cal. 7, 134 Pac. 985 (1913); Cook County v. City of Chicago, 311 Ill. 234, 142 N.E. 512 (1924); Kansas City v. School Dist. of Kansas City, 356 Mo. 364, 201 S.W.2d 930 (1947).

[12] 7 MCQUILLAN, MUNICIPAL CORPORATIONS § 24.519 (3d ed. 1949).

[13] 2 YOKLEY, MUNICIPAL CORPORATIONS § 391 (1956).

[14] Board of Educ. of the City of St. Louis v. City of St. Louis, 267 Mo. 356, 184 S.W. 975 (1916); Kaveny v. Board of Comm'rs, 173 A.2d 536 (N.J. 1961), decided subsequent to, and cites, principal case; Salt Lake City v. Board of Educ., 52 Utah 540, 175 Pac. 654 (1918); City of Milwaukee v. McGregor, 140 Wis. 35, 121 N.W. 642 (1909).

[15] Board of Regents v. City of Tempe, 88 Ariz. 299, 305, 356 P.2d 399, 403 (1960).

[16] 47 Cal. 2d 177, 302 P.2d 574 (1956).

quoting it with approval.[17] Instead the court simply reviewed the precedents and ruled in harmony with the majority that "the powers, duties and responsibilities assigned and delegated to a state agency performing a governmental function must be exercised free of control or supervision by a municipality within whose corporate limits the state agency must act."[18] At the same time the court pursued a second line of reasoning, based on an examination of relevant constitutional and statutory provisions.[19] They revealed, to the mind of the court, a "manifest Constitutional and legislative purpose" which was inconsistent with municipal control over the board's school construction functions.[20] The sense of these two conclusions, taken together, is that municipal building codes are not generally applicable to state buildings, but this rule is subject to the court's determination of legislative intent with respect to regulation of particular buildings.

The position adopted by the supreme court, as gleaned from its two principal lines of argument, seems eminently sensible. It follows the majority rule in proscribing municipal regulation of the construction of school buildings. By basing its decision also upon the interpretation of particular statutes, it leaves desirable flexibility for future decisions. The question is settled as to university construction in Arizona. But it may still be possible, with respect to other public buildings and other statutes, for a court to find legislative intent and public policy upholding the building codes even in the absence of express provisions. The reasoning which the trial court found so persuasive may yet persuade another court.[21]

Robert E. Riggs

TAXATION—TRANSACTION PRIVILEGE TAX—DEDUCTION OF TRADING STAMP COSTS FROM GROSS RECEIPTS.—A retail drug store that gave trading stamps to its customers who paid cash for merchandise or paid their bills promptly at the end of the month, deducted the cost of the stamps from its gross sales as cash discounts allowed and

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[17] Board of Regents v. City of Tempe, 88 Ariz. 299, 308, 356 P.2d 399, 405 (1960).

[18] *Id.* at 406.

[19] ARIZ. CONST. art. 11, § 1; ARIZ. REV. STAT. ANN. §§ 15-724, 15-725, 15-729 and 17-721 (1956) deal with grants of power to Board of Regents. ARIZ. REV. STAT. ANN. §§ 9-276 and 9-461 (1956) relate to powers of the city.

[20] Board of Regents v. City of Tempe, 88 Ariz. 299, 311, 356 P.2d 399, 407 (1960).

[21] Board of Regents v. City of Tempe, Memorandum and Order Denying Permanent Injunction, No. 109441, Ariz. Super. Ct., Maricopa County (1959).

taken on sales within the meaning of the Transaction Privilege Tax.[1] The Arizona State Tax Commission, contending that the trading stamp transaction was not a true cash discount, assessed and collected a 2% tax.[2] In this action, brought to recover the taxes paid under protest, the trial court entered judgment for the drug company. On appeal, *held*, reversed. Trading stamps given by a retailer to his customers in order to stimulate sales volume do not represent a "cash discount" within the purview of the Transaction Privilege Taxes Act, and the cost of the stamps can not be deducted from "gross receipts" in computing the amount of the tax owed to the state. *State Tax Comm'n v. Ryan-Evans Drug Stores*, 89 Ariz. 18, 357 P.2d 607 (1960).

The trading stamp industry, having played a small and insignificant part in our nation's economy since its inception in the late 19th century,[3] has, in the last decade,[4] witnessed a fantastic growth in the use of the stamps.[5] It is not surprising that there has been litigation

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[1] ARIZ. REV. STAT. ANN. § 42-1301(6) (1956) provides:

"Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property without any deduction on account of the cost of property sold, expense of any kind, or losses, but cash discounts allowed and taken on sales shall not be included as gross income.

[2] During the period from September 1, 1952, to June 30, 1955, Ryan-Evans paid the Sperry & Hutchinson Company the sum of $173,730 for the stamps at the rate of 2½ cents for each ten stamps, or $3.00 for 1200 stamps. All of the stamps were turned over by Ryan-Evans to its customers during the period. Ryan-Evans deducted this total cost of the stamps from its gross receipts. An audit having been made, the State Tax Commission refused to allow the deduction, and, under the authority of the Transaction Privilege Tax statutes, ARIZ. REV. STAT. ANN. §§ 42-1301 to -1347 (1956), assessed an additional tax of 2% on the cost of the stamps which amounted to $3,474.60, and demanded payment thereof from Ryan-Evans on August 31, 1955. Ryan-Evans then filed a petition for redetermination of the assessment and a request for a hearing. The hearing was held before the commission on or about October 26, 1955, and on November 14, 1955, the commission made and entered an order denying the petition of Ryan-Evans. Within thirty days after the order became final, Ryan-Evans brought this suit after paying the full amount of the assessment under protest. Abstract of Record, State Tax Comm'n v. Ryan-Evans Drug Stores, 89 Ariz. 18, 357 P.2d 607 (1960).

[3] The Sperry and Hutchinson Company, the oldest and largest of the trading stamp companies, was founded in 1896 in Jackson, Michigan. By 1914, stamps were given out with about 6% of all retail sales in the United States; by 1921 they were given out with about only 0.5%. Trading stamps were largely forgotten during the 1920s. There was some interest in the 1930s, but this never developed into a boom, and the stamp companies remained small and insignificant until after World War II. Fortune, Aug. 1960, p. 213.

[4] The first retailers to widely use trading stamps were the independent supermarkets, which adopted them early in the 1950s in an effort to compete against the big chains. Around 1956 the big chains themselves began to use stamps extensively. *Id.* at 117.

[5] The industry's volume in 1953 was $123 million, as compared to approximately $700 million in 1960, of which the Sperry and Hutchinson Company did about 40%. In 1959, trading stamps were tied to almost 15% of all sales in retail stores. According to one recent survey, approximately 75% of American families now save trading stamps, and almost half the savers are saving more than one kind. In 1959, 275 billion stamps were passed on to these consumers by some 200,000 retailers. There are about 250 stamp plan companies, operating 1,600 redemption centers distributing merchandise that, if it were bought at department stores, would cost perhaps $675 million. *Id.* at 116.

concerning the effect of the trading stamp plan[6] upon the price of an article.[7]

A variety of results have been reached by courts in deciding whether trading stamps, when given with fair-traded articles sold at the minimum price, constituted a violation of the Fair Trade Laws.[8] Courts have concluded that stamps represent a discount for the payment of cash, but not a reduction in price;[9] that stamps are merely a trade promotional device;[10] that stamps come within the meaning of the maxim *de minimis non curat lex;*[11] or that they represent a quantity discount.[12] Still another conclusion has been reached on the ground that since the stamps may be redeemed for merchandise, they have a value in themselves, and constitute a reduction to that extent in the price of the article purchased.[13] Other courts, in dealing with sales-below-cost statutes, have had to determine whether the statute is violated when, the sale being made at the lowest price permitted by the statute, the buyer is also given trading stamps.[14] Those jurisdictions that have been called upon to answer this question have answered in the negative.[15]

These decisions necessarily involved the determination of what each legislature did in fact intend in relation to the purpose of each act. Different conclusions might reasonably be reached as to the effect of trading stamps where different purposes are intended.[16] The legislative purpose of the Fair Trade Laws was to protect the manufacturer's good will in branded products,[17] while the sales-below-cost

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[6] In a typical stamp plan, a stamp company furnishes stamps to a retailer, for an agreed sum. The retailer then distributes the stamps to his customers, usually at the rate of one for each ten-cents worth of merchandise purchased by them. Finally the customer redeems the stamps at a redemption center operated by the stamp company. See generally 87 C.J.S. *Trading Stamps and Coupons* §§ 1-10 (1954); 24 TENN. L. REV. 557 (1956).

[7] For litigation other than the effect of the trading stamp upon the price of an article, see generally 52 AM. JUR. *Trading Stamps* §§ 1-16 (1944).

[8] Annot., 22 A.L.R.2d 1212 (1952).

[9] Weco Products Co. v. Mid-City Cut Rate Drug Stores, 55 Cal. App. 2d 684, 131 P.2d 856 (1942); Benjamin v. Palan Drug Co., 144 Misc. 879, 88 N.Y.S.2d 291 (Sup. Ct. 1948), *aff'd*, 275 App. Div. 1036, 92 N.Y.S.2d 413 (1st Dep't 1949); Nechamkin v. Picker, 67 N.Y.S.2d 60 (Sup. Ct. 1946); Gever v. American Stores Co., 387 Pa. 206, 127 A.2d 694 (1956); Note, 45 CALIF. L. REV. 378, 380 & n.11 (1957).

[10] Bristol-Myers Co. v. Lit Bros., Inc., 336 Pa. 81, 6 A.2d 843 (1939).

[11] The law is not concerned with trifles. Bristol-Myers v. Lit Bros., Inc., *supra*, note 10.

[12] Colgate-Palmolive Co. v. Max Dichter & Sons, Inc., 142 F. Supp. 545 (D.C. Mass. 1956).

[13] Colgate-Palmolive Co. v. Elm Farm Foods Co., 337 Mass. 221, 148 N.E.2d 861 (1958); Bristol-Myers Co. v. Picker, 302 N.Y. 61, 96 N.E.2d 177 (1950).

[14] Annot., 70 A.L.R.2d 1080 (1960); Note, 15 N.Y.U. INTRA. L. REV. 1 (1959).

[15] *Ibid.*

[16] *Trading Stamps: A Challenge to Regulation of Price Competition*, 105 U. PA. L. REV. 242 (1956).

[17] Old Dearborn Distributing Co. v. Seagram Distillers Corp., 299 U.S. 183 (1936).

statutes were enacted to curtail destructive price competition.[18] Since trading stamps have been called cash discounts in relation to these laws,[19] the question arises whether trading stamps should be called cash discounts within the purpose of the Transaction Privilege Tax as enacted by the Arizona legislature.[20]

This tax is imposed upon the privilege of entering business[21] for the purpose of raising public money[22] and in no sense for regulation.[23] The tax is measured by the gross income from sales,[24] but cash discounts allowed and taken on sales are not to be included as gross income.[25]

A cash discount is, by definition, a deduction from the billed price which the seller allows for payment within a certain time.[26] In the conventional cash discount, there is an actual reduction in the amount the retailer pays to the wholesaler, so long as payment is made within a specified time.[27] If the legislature, for the purpose of the tax, had in mind this wholesaler's cash discount (a reduction in the actual amount of cash the buyer pays) as the only type of discount which could be a deduction from gross income, then trading stamps do not amount to a cash discount within this interpretation.[28] In the stamp transaction, the actual amount of cash paid by the consumer to the retailer is not reduced, for the retailer receives the full listed price of the article whether or not stamps are issued with a purchase; whether or not the consumer takes the stamps, if issued; and whether or not the consumer redeems the stamps.[29]

It is argued that the conventional wholesaler's cash discount is not capable of practical application to the retail field (how can a customer be given a 2% discount on a 30c sale without using a

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[18] GRETHER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION 32-33 (1939).
[19] Authorities cited note 9 *supra*.
[20] It is to be borne in mind that the principal case involves the interpretation of an Arizona statute only.
[21] State Tax Comm'n v. Consumers Markets, Inc., 87 Ariz. 376, 351 P.2d 654 (1960).
[22] ARIZ. REV. STAT. ANN. § 42-1309 (1956).
[23] O'Neil v. United Producers & Consumers Co-op., 57 Ariz. 295, 113 P.2d 645 (1941).
[24] ARIZ. REV. STAT. ANN. § 42-1309 (1956).
[25] ARIZ. REV. STAT. ANN. § 42-1301(6) (1956); now ARIZ. REV. STAT. ANN. § 42-1301(8) (Supp. 1960).
[26] BLACK, LAW DICTIONARY 272 (4th ed. 1951).
[27] Standard Oil Co. v. State, 283 Mich. 85, 276 N.W. 908 (1937).
[28] Safeway Stores v. Oklahoma Retail Grocers Ass'n, 322 P.2d 179 (Okla. 1957) (concurring in part and dissenting in part opinion); Note, 45 CALIF. L. REV. 378 (1957).
[29] 105 U. PA. L. REV. 242, 248 (1956).

stamp, token or other discount memorandum[30]) and that the legislature must have intended that the cost of discount effectuated by the trading stamp should be deductible from gross income.[31] However, though trading stamps, cash register receipts, bags of fruit, flowers, or other tokens when given to consumers may, in effect, operate as a type of discount[32] for the payment of cash or prompt payment of credit sales, and consequently tend to increase sales volume, it does not necessarily follow that these discounts are cash discounts within the purview of the tax considered here.[33] The focal point of the tax is the amount of income received by the retailer, and the conventional cash discount operates to decrease this amount, while the trading stamp does not directly affect gross income.

As the decision stands,[34] neither the purpose of the tax, nor the other Arizona decisions[35] on the statute are thwarted. Had the court reached the opposite conclusion,[36] few stores would refrain from giving stamps, for the money spent on the stamps would not only tend to promote an increase in sales, but would also be deductible from the taxable gross income, thereby decreasing the retailer's taxes. This in turn might lead to the giving of an excessive amount of stamps, the result of which is highly undesirable.[37]

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[30] Note, 15 N.Y.U. INTRA. L. REV. 1, 4 (1959).

[31] This argument makes the intent of the legislature of prime importance, which is obviously the difficult problem for the court.

[32] From the buyer's viewpoint, when he receives stamps redeemable for two cents worth of merchandise on a purchase of an item priced at one dollar, his net purchase price may justifiably be considered ninety-eight cents. 105 U. PA. L. REV. 242, 248 (1956). While this may be in effect a discount to the buyer, from the standpoint of the seller, who receives his full listed price, the transaction may not amount to a "cash discount" in the conventional usage of the term.

[33] The proper distinction to be made is between the true cash discount which decreases the amount of cash received by the one giving the discount, and any other type of discount wherein the one giving the discount receives the full listed price of an article.

[34] The court stated that by using the words "cash discount" the legislature limited discount exclusions to those of cash only, and that a cash discount simply means an actual reduction in price for prompt payment. State Tax Comm'n v. Ryan-Evans Drug Stores, 89 Ariz. 18, 357 P.2d 607 (1960).

[35] The issue in the present case was specifically excluded in the case of State Tax Comm'n v. Consumers Markets, Inc., 87 Ariz. 376, 351 P.2d 654 (1960).

[36] The opposite conclusion was reached in the case of Eisenberg's White House, Inc., v. State Bd. of Equalization, 72 Cal. App. 2d 8, 164 P.2d 57 (1946). The Arizona court chose not to follow this decision, though the applicable part of the California statute was identical with the Arizona statute. The only other case directly in point, decided after the Arizona decision, is Brenner Tea Co. v. Iowa State Tax Comm'n, 109 N.W.2d 39 (Iowa 1961), in which the court quoted approvingly from the principal case and held that in computing a sales tax upon gross receipts under a statute which provided that discounts for any purpose allowed and taken on sales shall not be included in gross receipts, the retailer was not entitled to deduct from gross receipts, as discounts, the cost to it of trading stamps given to customers.

[37] The giving of an excessive amount of trading stamps in the Denver area (quadruple stamps for each ten-cents worth of merchandise purchased) resulted in the stamp companies having to prohibit this practice so as to avoid serious losses in profits to the retailers. Fortune, Aug. 1960, p. 216.

Furthermore, if trading stamps are cash discounts deductible from gross income, then logically the cost of anything the retailer gives to the consumer for sales promotion, such as the extension of interest free credit,[38] delivery service, free parking, or free samples, could be claimed deductible as a cash discount. It is doubtful that the legislature, without expressly considering the various promotional schemes, could have meant that they be valid deductions.[39]

Jerry L. Jacobs

TORTS—NEGLIGENCE—CHARITABLE IMMUNITY.—The plaintiff paid an admission price to engage in a bingo game which was being held on the premises of, and being operated by a church. The proceeds were going to be used solely for charitable purposes. The plaintiff suffered serious injuries when a chair, furnished by the church, collapsed and plaintiff was thrown to the floor. The court of appeals affirmed judgment for the plaintiff and certified record to the Ohio Supreme Court for review and determination. On certification, *held*, affirmed. A charitable institution conducting commercial activities had removed itself from protection it might have claimed as an eleemosynary institution and therefore was liable for torts arising out of the conduct of such enterprises. *Blankenship v. Alter*, 171 Ohio St. 65, 167 N.E.2d 922 (1960).

There has been considerable change in tort liability of charitable institutions since the beginning of the twentieth century.[1] Among the fifty states plus the District of Columbia and Puerto Rico, at the latest count, only seven jurisdictions still grant complete immunity,[2]

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[38] The purchaser who takes immediate delivery of the goods yet defers payment for ninety days has the value of the legal rate of interest on the purchase price for that period. 105 U. PA. L. REV. 242, 249 (1956). Thus, if a trading stamp is a cash discount, there is good reason for this economic advantage gained by the customer to be called a cash discount.

[39] For further information on trading stamps in Arizona, see the Report on Trading Stamps, prepared by the research staff of the Arizona Legislative Council, June, 1957.

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[1] HARPER & JAMES, TORTS § 29.17 (1956).

[2] These jurisdictions are: Maine, Jensen v. Maine Eye & Ear Infirmary, 107 Me. 408, 78 Atl. 898 (1910); Massachusetts, Carpenter v. YMCA, 324 Mass. 365, 86 N.E.2d 634 (1949); Missouri, Dille v. St. Luke's Hosp., 355 Mo. 436, 196 S.W.2d 615 (1946); Oregon, Landgraver v. Emmanuel Lutheran Charity Bd., 203 Ore. 489, 280 P.2d 301 (1955); Pennsylvania, Michael v. Hahnemann Medical College & Hosp. of Philadelphia, Inc., 404 Pa. 424, 172 A.2d 769 (1961); South Carolina, Caughman v. Columbia YMCA, 212 S.C. 337, 47 S.E.2d 788 (1948); Wyoming, Bishop Randall Hosp. v. Hartley, 24 Wyo. 408, 160 Pac. 385 (1916).

twenty-three impose liability,[3] eighteen have qualified immunity[4] and four seem to have no case on the subject.[5] In the last twenty years many of the jurisdictions which used to grant immunity have reversed their earlier decisions[6] and now hold modern day charities liable for personal injuries.[7] In fact it has been noted that:

> The immunity of charities is clearly in full retreat; and it may be predicted with some confidence that the end of another decade will find a majority of the American jurisdictions holding that it does not exist.[8]

In some states the charitable institution is not liable for negligence in the course of activities within its corporate powers carried on to accomplish directly its charitable purposes,[9] even though such activities incidentally yield revenue.[10] Most courts which have considered the question hold, even in the absence of statutory provision,[11]

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[3] These jurisdictions are: Alaska, Iuengel v. City of Sitka, 118 F. Supp. 399 (D. Alaska 1954); Arizona, Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951); California, Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951); Colorado, St. Luke's Hosp. v. Long, 125 Colo. 25, 240 P.2d 917 (1952); Delaware, Durnay v. St. Francis Hosp., Inc., 46 Del. 350, 83 A.2d 753 (1951); Florida, Nicholson v. Good Samaritan Hosp., 145 Fla. 360, 199 So. 344 (1940); Idaho, Wheat v. Idaho Falls Latter Day Saints Hosp., 78 Idaho 60, 297 P.2d 1041 (1956); Iowa, Haynes v. Presbyterian Hosp. Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950); Kansas, Noel v. Menninger Foundation, 175 Kan. 751, 267 P.2d 934 (1954); Kentucky, Mullikin v. Jewish Hosp. Ass'n, 348 S.W.2d 930 (Ky. 1961); Minnesota, Swigerd v. City of Ortonville, 246 Minn. 339, 75 N.W.2d 217 (1956); Mississippi, Mississippi Baptist Hosp. v. Holmes, 214 Miss. 906, 55 So. 2d 142 (1951); New Hampshire, Nickerson v. Laconia Hosp. Ass'n, 96 N.H. 482, 79 A.2d 5 (1951); New Jersey, Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958); New York, Dunham v. Village of Canisteo, 303 N.Y. 498, 104 N.E.2d 872 (1952); North Dakota, Rickbeil v. Grafton Deaconess Hosp., 74 N.D. 525, 23 N.W.2d 247 (1946); Ohio, Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956); Oklahoma, Gable v. Salvation Army, 186 Okla. 687, 100 P.2d 244 (1940); Puerto Rico, Tavarez v. San Juan Lodge No. 972, B.P.O.E., 68 P.R. 681 (1948); Utah, Brigham Young Univ. v. Lillywhite, 118 F.2d 836 (10th cir. 1941); Vermont, Foster v. Roman Catholic Diocese of Vt., 116 Vt. 124, 70 A.2d 230 (1950); Wisconsin, Kojis v. Doctors Hosp., 12 Wis. 2d 367, 107 N.W.2d 292 (1961).

[4] Rodkey, *Charitable Immunity—A Tale of a Law in Flux*, 48 ILL. B.J. 644, 646 (1960). These states are: Ala., Ark., Conn., Ga., Ill., Ind., La., Md., Mich., Neb., Nev., N.C., R.I., Tenn., Tex., Va., Wash., W.Va.

[5] Rodkey, *supra* note 4, at 646. These states are: Hawaii, Mont., N.M., and S.D.

[6] RESTATEMENT (SECOND), TRUSTS § 402 (b). Comment *d*, 1959. The comment on subsection (2) of section 402 reads:

> The trend of judicial opinion favors the denying of immunity, putting a charitable organization in the same position as that of non-charitable organizations subjecting them to liability in tort not only for the negligence of the governing board but also for the negligence of employees, subjecting them to liability to recipients of benefits as well as to other persons.

[7] See *supra* note 2 and cases cited for Ariz., Calif., Del., Iowa, Kan., Miss, N.J., Ohio, Okla., and Vt.

[8] PROSSER, TORTS § 109 at 788 (2d ed. 1955).

[9] Conklin v. John Howard Industrial Home, 224 Mass. 222, 112 N.E. 606 (1916).

[10] Carpenter v. YMCA, 324 Mass. 365, 86 N.E.2d 634 (1949).

[11] For a case where liability was rested upon a statute, see McMillen v. Summunduwot Lodge, 143 Kan. 502, 54 P.2d 985 (1936).

that there is liability for negligence in the course of activities incidental to the corporate powers but primarily commercial in character, although carried on to obtain revenue to be used solely for the charitable purposes of the institution.[12]

Those who advocate the retention of the doctrine of charitable immunity often argue that the courts should not overrule their earlier decisions for such is a violation of the doctrine of stare decisis.[13] The late Justice Oliver Wendell Holmes answered this argument in an often quoted phrase that there ought to be a far better basis for a rule than the simple fact "that so it was laid down in the time of Henry IV."[14] Others state that if there is to be any change made in the law, it should be made by the legislature.[15] To require an injured individual to forego compensation he otherwise is entitled to, because the injury was committed by a servant of the charity, imposes such a burden as cannot be regarded as socially desirable nor consistent with sound policy.[16]

Prior to the decision laid down in *Ray v. Tucson Medical Center*,[17] Arizona had held that charitable institutions were not liable for the torts of their servants, where due care had been exercised in the selection of the employee.[18] The Arizona Supreme Court in overruling this doctrine of limited liability expressed doubt that any valid reasons had ever existed for holding charitable institutions immune and stated that, if such reasons existed in the past, they are today outweighed by such considerations as the size of the charities, the injustice to the insured, insurance programs, and obvious legal inconsisentcy underlying the reasons in limiting liability. This same court declared, ". . . if public policy ever required that charitable institutions should be immune from liability for the torts of their servants, that public policy no longer exists."[19]

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[12] Rhodes v. Millsaps College, 179 Miss. 596, 176 So. 253 (1937); see also Blatt v. Nettleton Home for Aged Women, 365 Mo. 30, 275 S.W.2d 344 (1955); Siidekum v. Animal Rescue League of Pittsburgh, 353 Pa. 408, 45 A.2d 59 (1946).

[13] Joachim, *Why Abandon the Doctrine of Stare Decisis?*, 45 A.B.A.J. 822 (1959).

[14] Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

[15] Joachim, *op. cit. supra* note 12. *Contra*, Michael v. Hahnemann Medical College & Hosp. of Philadelphia Inc., 404 Pa. 424, 172 A.2d 769, 774 (1961):

> A rule of *non-liability*, even though judge-made, that has become as firmly fixed in the law of this State as has the charitable immunity from tort liability, should not be abrogated otherwise than by a statute made to operate prospectively. Whether, in this day of traffic hazards from automotive vehicles of charities as well as of all others, the rule as to charitable immunity should be rescinded poses a question of public policy which falls peculiarly within the competence of the legislature. [Emphasis added]

[16] HARPER, TORTS § 294 (1933).

[17] 72 Ariz. 22, 230 P.2d 220 (1951).

[18] Southern Methodist Hosp. & Sanatorium v. Wilson, 45 Ariz. 507, 46 P.2d 118 (1935).

[19] Ray v. Tucson Medical Center, 72 Ariz. 22, 36, 230 P.2d 220, 229-30 (1951).

The Ohio Supreme Court in the principle case has taken a step in the right direction, just as the Arizona Supreme Court did in *Ray v. Tucson Medical Center*,[20] when it held that charitable institutions were liable for torts of their servants which caused injury to third persons. The greatest objection to taking away the immunity granted to charitable institutions is that public policy is highly opposed to the depletion of trust funds. However, public policy also favors a redress for every wrong committed. It is not unreasonable to assume that the trust fund and the recipients of charitable services could both be protected through liability insurance. Perhaps the legislature should require the institution itself to carry liability insurance. This procedure would place the responsibility directly or indirectly upon the ones who could prevent future wrongs.[21] A charitable institution should not be exempt on the ground of public policy where state constitutions and statutes do not create such an exemption and the constitution provides that every person for an injury done him shall have remedy by due course of law. More courts should realize the truth in the following philosophy:

> It is a trite saying that charity begins at home. It may reasonably be said that charitable institutions must first fairly compensate those who are injured and damaged by the negligence of their officers and servants in the conduct of the affairs of such institutions before going farther afield to dispense charity to do good. Men and corporations alike are required to be just before being charitable.[22]

Carl E. Hazlett

TORTS—PRENATAL INJURIES—RIGHT OF AN INFANT TO RECOVER FOR PREPARTUM INJURIES.—The plaintiff was allegedly born mongoloid as a result of injuries sustained when her mother was in an auto collision when the child was a fetus of one month. In the plaintiff's action for damages, the lower court entered an order sustaining preliminary objections to the complaint, denying that the plaintiff had a right of action. On appeal, *held*, reversed. An infant has a right to bring action for prepartum injuries, even though the alleged injuries were sustained before the infant was viable. *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960).

As recently as 1940, the majority of jurisdictions, in the absence

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[20] *Ibid.*

[21] McDonald, *Torts—Liability of Charitable Institutions*, 5 BAYLOR L. REV. 199, 202-03 (1953).

[22] Geiger v. Simpson Methodist-Episcopal Church, 174 Minn. 389, 219 N.W. 463, 465 (1928).

of statute, denied an infant the right to recover from prenatal injuries.[1] The *Restatement of Torts*[2] still reflects this point of view. The courts relied on decisions[3] made in the light of the medical knowledge of yesteryear which recognized the fetus as merely a part of the mother.[4] In the last two decades, the courts began to reexamine their prior decisions and to allow a right of recovery[5] to infants injured en ventre sa mere, if the injuries were sustained after viability.[6] Legal thinking acknowledged the fetus as a separate, independent being:[7] an entity dependent on its mother for sustenance, but otherwise a life apart.[8] This entity had a right to start life unimpaired, a right to freedom from injury,[9] and "to grow into the ordinary activities of life."[10] A violation of these rights has generally come to be considered actionable.[11]

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[1] 27 AM. JUR. *Infants* § 3 (1940).

[2] RESTATEMENT, TORTS § 869 (1939) states: "A person who negligently causes harm to an unborn child is not liable to such child for harm."

[3] Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900); Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).

[4] It might be noted that the criminal law long distinguished between the life and existence of the unborn child and that of its mother. IV BLACKSTONE *198 states:

> To kill a child in its mother's womb is now no murder, but is a great misprision, but if the child be born alive and dieth by reason of the potion or bruises it received in the womb, it seems by the better opinion, to be murder in such as administered or gave them . . . the killing must be committed with malice aforethought to make it the crime of murder.

[5] Damasiewicz v. Gorusch, 197 Md. 417, 79 A.2d 550 (1951); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Williams v. Marion Transit Co., 152 Ohio St. 114, 87 N.E.2d 334 (1949). See also 10 A.L.R.2d 634 (1949).

[6] BLACK, LAW DICTIONARY 1737 (4th ed. 1951) in defining viability says: "A term used to denote the power a new-born child possesses of continuing its independent existence."

[7] HARPER & JAMES, TORTS, § 18.3, 1028-31 (1956).

[8] Before the case law granted the separate existence of the unborn baby, two states, California (CAL. CIV. CODE § 29) and Louisiana (REV. CIV. CODE §§ 29, 252, 954, 956, 1482) gave to unborn children a cause of action accruing at birth.

[9] Keyes v. Construction Sev. Inc., 340 Mass. 633, 165 N.E.2d 912 (1960).

[10] Williams v. Marion Rapid Transit Inc., 152 Ohio, 114, 87 N.E.2d 334 (1949).

[11] Wendt v. Lillo, 182 F. Supp. 56 (N.D. Iowa 1960), (relying on Iowa law); Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939); Tursi v. New England Windsor Co., 19 Conn. Supp. 242, 111 A.2d 14 (1955); Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (1956); Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956), *appeal denied*, 94 Ga. App. 328, 94 S.E.2d 523 (1956); Rodriquez v. Patti, 415 Ill. 496, 114 N.E.2d 721 (1953); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Cooper v. Blanck, 39 So. 2d 352 (La. 1923) (case unreported until 1949); Damasiewicz v. Gorusch, 197 Md. 417, 79 A.2d 550 (1951); Keyes v. Construction Serv. Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); Verkennes v. Corniea, 229 Minn. 365, N.W.2d 838 (1949); Rainey v. Horn, 221 Miss. 269, 72 So.2d 434 (1954); Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951); Williams v. Marion Transit Co., 152 Ohio St. 114, 87 N.E.2d 334 (1949); Mallison v. Pomeroy, 205 Ore. 690, 291 P.2d 225 (1955); Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960).

Today, there is a trend of the courts to extend this protection of the right of unborn children from the time the child is conceived, whether viable or not.[12] The courts and the exponents of this doctrine appreciate the inherent problems and difficulties of its administration. Foremost, proof is difficult. The determination of the proximate cause of many prenatal injuries and the etiology of some congenital diseases and disorders may be speculative at best.[13] But, difficulty of proof is no reason to preclude a cause of action or deny to the infant the right to protection of his interests.[14] Then, too, because the statute of limitations governs most tort actions, it may be essential to determine whether the cause of action accrues at the time of injury or the time of birth.[15] If it accrues at the time of injury, the child who is born dead because of injuries prenatally received might have a cause of action.[16] There is also worry about the threatened flood of litigation which so far has failed to materialize.[17]

In view of the medical knowledge that certain diseases (such as rubella, commonly known as German measles) can cause predictable harm to a child even before the age of viability,[18] the legal recognition of the rights of the unborn infant to protection of his interests from the moment of conception has more than mere speculative basis. Arizona has recognized certain legal rights of an infant, accruing before birth, both in statute,[19] and in case law.[20] Whether it

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[12] Besides the principal case, see Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960), and Kelly v. Gregory, 282 App. Div. Rep. 542, 125 N.Y.S.2d 696 (1953).

[13] CECIL & LOEB, TEXTBOOK OF MEDICINE 1470 (10th ed. 1959) says this about mongolism:

> The etiological factors responsible for the disease are little understood. . . [Mongolism] appears as a . . . consequence of a variety of maternal disorders, including advanced age, toxic conditions, endocrine disorders, and pathological lesions of the sexual organs . . . but no conclusive evidence has been offered in favor of any of these factors.

9 CYCLOPEDIA OF MEDICINE, SURGERY, SPECIALTIES 7 (1959) states:

> [Mongolism] incidence is 2 per 1000 births . . . etiology unknown . . . [there are] clues that genetic factor is significant . . . age of mother . . . biochemical abnormality.

[14] Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

[15] White, *The Right of Recovery for Prenatal Injuries*, 12 LA. L. REV. 383 (1952).

[16] In Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178, 180 (1954), the court admits the separate existence of the fetus from the time of conception, but denies a cause of action to the child because it was born dead, allegedly of injuries sustained before birth. The court allowed recovery to the parents.

[17] Puhl v. Milwaukee Auto Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163 (1959). See also Muse & Spinella, *Right of Infant to Recover for Prenatal Injury*, 36. VA. L. REV. 611 (1950).

[18] 12CYCLOPEDIA OF MEDICINE, SURGERY, SPECIALTIES 518 (1961) states:

> [C]ongenital anomalies occur in 100 per cent of the cases if mother has rubella in the first two months of pregnancy. . . .

[19] ARIZ. REV. STAT. ANN. § 14-131 (1956).

[20] Long v. Long, 39 Ariz. 271, 5 P.2d 1047 (1931) (awarded child support to an infant conceived before but born subsequent to a divorce decree.

would follow the national trend in allowing recovery for prenatal injuries is questionable. The Arizona Supreme Court has gone on record as saying it would follow the Restatement in the absence of statute and prior ruling.[21] However, the fact that the Restatement is undergoing extensive revision to reflect recent trends, the advances of medical science and knowledge, legal writings and the decisions of neighbor jurisdictions, might influence our court to reach a result in line with modern judicial thought.

Thus the last twenty years have seen almost a complete transition from the complete denial of the right of the infant to recover for any prenatal injuries, to the granting a right of action and recovery to infants injured after viability, to the present case which grants a right of action to an infant whose alleged injuries were received when an embryo of one month, long before viability. To some extent, this decision reflects the general direction of tort law, which serves to protect an ever widening range of interests.[22]

Lillian S. Fisher

TORTS—PROCURING BREACH OF CONTRACT—INTENTIONAL INTERFERENCE WITH ATTORNEY'S CONTINGENT FEE CONTRACT.—Defendant, an insurance company, intentionally induced the clients of the plaintiff attorneys to breach their contingent fee contract with the plaintiff, for which the plaintiff brought this suit. Demurrer by the defendant was sustained. On appeal, *held*, reversed. Intentional and unjustifiable interference with an attorney's contingent fee contract by a third party is actionable and an allegation by the defendant of the issuance of a public liability policy to the persons who caused injury to the plaintiff's clients does not constitute justification. *Herron v. State Farm Mut. Ins. Co.*, 14 Cal. Rptr. 294, 363 P.2d 310 (1961).

An action ex delicto against a third party for intentionally inducing the breach of a contract is a relatively new concept in the law,[1]

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[21] MacNeil v. Perkins, 84 Ariz. 74, 324 P.2d 211 (1958); Rodriquez v. Terry, 79 Ariz. 348, 290 P.2d 248 (1955); Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953); Western Coal & Mining Co. v. Hilvert, 63 Ariz. 171, 160 P.2d 331 (1945). However, in Reed v. Real Detective Publishing Co., 63 Ariz. 294, 303, 162 P.2d 133, 138 (1945) the court noted that it would be unwise to follow the Restatement blindly, and reserved the right to judge the case on its merits. For a detailed discussion of the adherence of the Arizona courts to the Restatement, see Ehrenzweig, *The Restatement as a Source of Conflicts Laws in Arizona*, 2 ARIZ. L. REV. 177 (1960).

[22] PROSSER, TORTS, 3 (2d ed. 1955).

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[1] The first reported case to allow the action ex delicto was Lumley v. Gye, 2 El. & Bl. 216 (1853). For a complete historical background see generally PROSSER, TORTS § 106 (2d ed. 1955); Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663-69 (1923).

but it has developed into a general principle in the years since its inception.[2] The theory upon which the principle is based is that a person has a right[3] to be secure in his contractual relations and free from outside interference, unless such interference is justified or privileged. Even though the contract is at the will of one or both of the parties, the general principle remains that the right will be protected from such intentional inference by a stranger to the contract.[4] It is generally held that the defendant's conduct will be justified if he is acting to protect his own contractual right[5] or a right equal or superior to that of the plaintiff.[6]

This general principle has only recently been applied to the action by an attorney against a third party for intentionally interfering with his contingent fee contract.[7] On principle and in fact, the action by the attorney does not differ from that invoked against interference with any other contract.[8] The right of a client to justifiably discharge his attorney is upheld as a universal rule,[9] but an attorney's contract with his client is a legal and valid contract which should and does merit the protection of the courts against intentional and unjustifiable third party interference.[10] By allowing the attor-

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[2] RESTATEMENT, TORTS § 766 (1939); PROSSER, TORTS § 106 (2d ed. 1955). For an extensive collection of cases prior to 1928 applying the principle see Appendix A, 41 HARV. L. REV. 764 (1928). For later cases see any key number digest under Torts 12.

[3] This right to receive the promised performance is generally held to be a property right. *E.g.*, R an W Hat Shop v. Sculley, 98 Conn. 1, 118 Atl. 55 (1922); Shannon v. Gaar, 233 Iowa 38, 6 N.W.2d 304 (1942); Johnson v. Gustafson, 201 Minn. 629, 277 N.W. 252 (1938); Meltzer v. Kaminer, 131 Misc. 813, 227 N.Y.S. 459 (1927).

[4] "The fact that the employment is at the will of the parties, respectively, does not make it at the will of others." Truax v. Raich, 239 U.S. 33, 38 (1915). *E.g.*, Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 172 P.2d 867 (1946); Childress v. Abeles, 240 N.C. 667, 84 S.E.2d 176 (1954). *Contra*, Harris v. Home Indem. Co., 16 Misc. 2d 702, 185 N.Y.S.2d 287 (1959).

[5] *E.g.*, Farrell Publishing Corp. v. W. J. Smith Publishing Co., 165 F. Supp. 40 (S.D.N.Y. 1958); Lake v. Angelo, 163 A.2d 611, (D.C. Mun. App. 1960); Meason v. Ralston Purina Co., 56 Ariz. 291, 107 P.2d 224 (1940); National Life & Acc. Ins. Co. v. Wallace, 162 Okla. 174, 21 P.2d 492 (1933).

[6] R an W Hat Shop v. Sculley, 98 Conn. 1, 118 Atl. 55 (1922); Conway v. O'Brien, 269 Mass. 425, 169 N.E. 491 (1929); Mutual Benefit Health & Acc. Ass'n., 240 Mo. App. 236, 207 S.W.2d 511 (1947) (dictum); National Life & Acc. Ins. Co. v. Wallace, *supra* note 5.

[7] The first reported case was Gordon v. Mankoff, 146 Misc. 258, 261 N.Y.S. 888 (1931) (citing no previous precedent).

[8] *E.g.*, Employers Liab. Assur. Corp. v. Freeman, 229 F.2d 547 (10th Cir. 1955); State Farm Fire Ins. Co. v. Gregory, 184 F.2d 447 (4th Cir. 1950); Lurie v. New Amsterdam Cas. Co., 270 N.Y. 379, 1 N.E.2d 472 (1936); Klauder v. Creeger, 327 Pa. 1, 192 Atl. 667 (1937); Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945).

[9] *E.g.*, Hoult v. Beam, 178 Cal. App. 2d 766, 3 Cal. Rptr. 191 (1960); Cole v. Meyers, 128 Conn. 223, 21 A.2d 396 (1941); People v. Franklin, 415 Ill. 514, 114 N.E.2d 661 (1953).

[10] See note 8 *supra*.

ney this action, the courts have given him one more remedy in his inadequate arsenal for seeking redress when his contract of employment has been unjustly terminated.[11]

The Supreme Court of Arizona has not yet been called upon to directly consider the question raised by the instant case. With reference to third party interference with other types of contracts, the court has consistently held that the action will lie.[12] Mention was made of an attorney's contingent fee contract and the *ex delicto* action for its breach in *Employers Cas. Co. v. Moore*[13] in which the Arizona Court, by way of dictum, stated that the conduct of the defendant insurer in negotiating and culminating a settlement with the plaintiff's client was lawful and gave the plaintiff attorneys no right against the defendant.[14]

The Supreme Court of California in deciding the instant case has made a distinction between a breach of an attorney's contract caused by settling with the attorney's client, the resulting breach of contract being merely a by-product of the settlement, and a breach caused by the active inducement of the insurer, the resulting breach being the direct objective in order to facilitate a more advantageous settlement with the client.[15] In the former situation, the breach of contract gives no action against the third party,[16] while in the latter, the added element of active inducement to breach the contract opens the door to the *ex delicto* remedy against the third party.[17] This distinction is basically sound as furthering the policy of the law to encourage good faith compromise and settlement of litigation,[18] while at the same time protecting the interest of the attorney in his employment contract from unjustifiable interference by strangers to the contract.[19]

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[11] Covert v. Allen, 61 Ariz. 19, 143 P.2d 341 (1943); Cole v. Meyers, 128 Conn. 223, 21 A.2d 396 (1940). See Schwartz v. Schwerin, 85 Ariz. 242, 336 P.2d 144 (1959); Covert v. Randles, 53 Ariz. 225, 87 P.2d 488 (1939); Walker v. Wright, 28 Ariz. 235, 236 Pac. 710 (1925); Dey v. Hill, 20 Ariz. 466, 181 Pac. 462 (1919). See generally 4 WILLISTON, CONTRACTS § 1029 (rev. ed. 1936); 34 TEXAS L. REV. 1082 (1956); 1960 WIS. L. REV. 156.

[12] McNutt Oil & Refining Co. v. D'Ascoli, 79 Ariz. 28, 281 P.2d 966 (1955); Tipton v. Burson, 73 Ariz. 144, 238 P.2d 1098 (1951); Meason v. Ralston Purina Co., 56 Ariz. 291, 107 P.2d 224 (1940).

[13] 60 Ariz. 544, 142 P.2d 414 (1943).

[14] *Id.* at 550, 142 P.2d at 416.

[15] Herron v. State Farm Mut. Ins. Co., 14 Cal. Rept. 294, 363 P.2d 310 (1961).

[16] *Ibid.*

[17] *Ibid.* See generally note 8 *supra.*

[18] Millsap v. Sparks, 21 Ariz. 317, 321, 188 Pac. 135, 136 (1920) (dictum).

[19] The court denied the contention of the defendant insurer that its contract of insurance with the person who caused injury to the plaintiff's client was sufficient to justify the interference. Herron v. State Farm Mut. Ins. Co., 14 Cal. Rptr. 294, 297, 363 P.2d 310, 313 (1961).

Even though the attorney may, in some instances, proceed against a person who causes his client to breach the contingent fee contract, his remedy is at best inadequate.[20] To improve this situation, a statute might be enacted, as at least one state has done,[21] that would provide the attorney with a lien, in addition to his present common law and statutory liens, on the cause of action of his client against the defendant.[22] Such a lien could be enforced against the defendant, in the event of a settlement, whether or not the suit has been initiated.[23]

Timothy W. Barton

TORTS—STRICT LIABILITY—DAMAGE DUE TO BLASTING.—The plaintiff brought an action for damages to his home caused by concussion and vibration resulting from the defendant's blasting operation in the excavation of a sewer line ditch 200 feet from the plaintiff's residence. The defendant demurred to the complaint, one of the grounds being that it did not allege a cause of action in that the plaintiff failed to plead negligence. The demurrer was overruled. On appeal, *held*, affirmed. Strict liability is attached to damages caused by the use of explosives in blasting. *Wallace v. A. H. Guion & Co.*, 237 S.C. 349, 117 S.E.2d 359 (1960).

The view taken by the majority of the jurisdictions that have been faced with the question,[1] as well as the one adopted by the *Restatement of Torts*[2] is that a person who introduces an ultrahazardous activity, such as blasting, into the community, should be held as an insurer for damages caused by such activity.[3] Other states, in-

[20] See, Stevens, *Our Inadequate Attorney's Lien Statutes—A Suggestion*, 31 WASH. L. REV. 1-3 (1956).

[21] ILL. REV. STAT., ch. 13, § 14 (1959).

[22] *Ibid.* See suggested attorney's lien statute in 31 WASH. L. REV. 1, 20 (1956). Arizona at present has no statutory provision concerning attorney's liens, but does recognize the common law liens. Linder v. Lewis, Roca, Scoville, Beauchamp, 85 Ariz. 118, 333 P.2d 286 (1955); Richfield Oil Co. v. LaPrade, 56 Ariz. 100, 105 P.2d 1115 (1940); Barnes v. Shattuck, 13 Ariz. 338, 114 Pac. 952 (1911).

[23] Standidge v. Chicago Ry. Co., 254 Ill. 524, 98 N.E. 963 (1912); Bennett v. Chicago & E.I.R.R. Co., 327 Ill. App. 76, 63 N.E.2d 527 (1945).

[1] See Annot., 20 A.L.R.2d 1372 (1951, Supp. 1960), listing approximately 27 states which allow recovery without negligence.

[2] RESTATEMENT, TORTS §§ 519-24 (1938).

[3] However, the liability normally is not extended to all possible damage covered by blasting. "Expressly or tacitly there seems to be a recognition of the risk area principle in the blasting cases, i.e., that liability attaches only for harm to person or property within the area of foreseeable danger." 2 HARPER & JAMES, TORTS 816 (1956).

For application of this rule, see Gronn v. Rogers Constr., Inc., 221 Ore. 226, 350 P.2d 1086 (1960) (blasting frightened minks and adversely affected their reproduction); Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991 (1892) (rock thrown 900-1200 feet killing person).

cluding Maine, Massachusetts, and New York,[4] assert that fault is a prerequisite to liability in the blasting cases, frequently allowing the use of *res ipsa loquitur* to aid the plaintiff.[5] However, the jurisdictions requiring negligence distinguish between damages caused by the entry of tangible substance upon plaintiff's land[6] or coming in contact with his person,[7] and damage resulting from vibration or concussion, agreeing with the majority that the defendant is strictly liable in the former situations.[8] This distinction had its origin in the common law forms of action of trespass and case,[9] for when damages were caused by vibration or concussion they were considered consequential and liability resulted only if the defendant was negligent. However this archaic distinction has come in for severe criticism[10] and is no longer tenable on either a procedural or substantive law basis. Also in some of those jurisdictions which require negligence, the courts have occasionally approved indirect methods of holding the defendant strictly liable in the blasting cases.[11]

The principal case was one of first impression in South Carolina and the decision is of interest in Arizona which has not ruled on the specific question of whether the defendant will be strictly liable for

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[4] Reynolds v. W. H. Hinman Co., 145 Me. 343, 75 A.2d 802 (1950); O'Regan v. Verrochi, 325 Mass. 391, 90 N.E.2d 671 (1950); Booth v. Rome, W. & O. T.R.R., 140 N.Y. 267, 35 N.E. 592 (1893). Other courts listed in Annot., *supra* note 1, as holding this minority view are: Ala., Kan., Ky., Md., N.H., N.J., Tex., and Vt.

[5] Vattilana v. George & Lynch, Inc., 154 A.2d 565 (Del. 1959); Marlowe Constr. Co. v. Jacobs, 302 S.W.2d 612 (Ky. 1957); Cratty v. Samuel Aceto & Co., 151 Me. 126, 116 A.2d 623 (1955); Smith, *Liability for Substantial Physical Damage to Land by Blasting—The Rule of the Future*, 33 HARV. L. REV. 542 (1920). *Contra*, Caramagno v. United States, 37 F. Supp. 741 (D.C. Mass. 1941) (apparently applying the law of Mass.); Crocker v. W. W. Wyman, Inc., 99 N.H. 330, 110 A.2d 271 (1954).

[6] Marlowe Constr. Co. v. Jacobs, *supra* note 5; Adams & Sullivan v. Sengel, 177 Ky. 535, 197 S.W. 974 (1917); Hay v. Cohoes Co., 2 N.Y. 159 (1849); Smith, *supra* note 5, at 553.

[7] Louisville & N.R.R. v. Smith's Adm'r, 203 Ky. 513, 263 S.W. 29 (1923); St. Peter v. Denison, 58 N.Y. 416 (1874).

[8] PROSSER, *The Principle of Rylands v. Fletcher*, in SELECTED TOPICS OF THE LAW OF TORTS 135, 160 (1953), citing Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991 (1892), as the only exception noted to that date.

[9] PROSSER, TORTS 336 (2d ed. 1955).

[10] "[I]t can hardly be supposed that a man's responsibility for the consequences of his acts varies as the remedy happens to fall on one side or the other of the penumbra which separates trespass from the action on the case." HOLMES, THE COMMON LAW 80 (1881). See also 2 HARPER & JAMES, *op. cit. supra* note 3, at 818.

[11] See, *e.g.*, Coly v. Cohen, 289 N.Y. 365, 45 N.E.2d 913 (1942), where a member of the public was held to be a third party beneficiary to a contract with the City of Buffalo; and City of Dallas v. Newberg, 116 S.W.2d 476 (Tex. Civ. App. 1938) which was decided on the basis of a nuisance theory. Also see Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951). Gregory feels that the theories of unintended trespass and *res ipsa loquitur* have been used to camouflage the fact that the courts were imposing absolute liability.

damage caused by his blasting operations.[12] Careful research has uncovered only one blasting case that has been considered by the supreme court of Arizona, *Drumm v. Simer*,[13] in which the plaintiff alleged two specific acts of negligence in the defendant's blasting operations causing damage to her residence at least one and one-quarter miles away. It was held that the plaintiff had failed to prove their allegations; therefore the defendant was not liable. One may draw the inference from this case that negligence would be required in Arizona, but the court did not even discuss the alternative remedy of strict liability, apparently because the plaintiff failed to raise it.

The doctrine of strict liability as applied today is relatively new and is a break from the modern tort concept of liability based upon fault,[14] or more specifically, on conduct which falls below the standard required by society of its members.[15] The courts and state legislatures of our country have generally adopted strict liability in certain areas of the law, such as implied warranties and workmen's compensation, fully recognizing, at the time of such adoption, their departure from the normal requirement of fault as a basis of liability.[16]

The earliest and leading case in the area of unusual and dangerous activity as a basis of strict liability was *Rylands v. Fletcher*.[17] This case is not strictly analogous to the blasting cases for the plaintiff's land was flooded unintentionally by the breaking of the defendant's reservoir barriers, whereas in the blasting cases the concern is with intentional discharges of explosive. However the result reached is defensible on much the same considerations of policy as discussed below.[18] Although *Rylands* was not embraced with open arms when it was first discussed in the American courts[19] it has since been approved by the majority of our jurisdictions either by name or a statement of principle clearly derived from it.[20]

The decision of the courts in the blasting cases is complicated by the economic justification for such activity in a highly industrialized society balanced against the obvious dangers involved even when

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[12] In Annot., *supra* note 1, at 1406, Arizona is considered in the doubtful category as to their views on this question.

[13] 68 Ariz. 319, 205 P.2d 592 (1949).

[14] PROSSER, *op. cit.* supra note 9, at 317. *Contra*, Smith, *Tort and Absolute Liability—Suggested Changes in Classification*, 30 HARV. L. REV. 409, 413 (1917). Smith says that the exceptional situations today where a man is acting at his peril are survivals of the time when all man's acts were done at his peril.

[15] 2 HARPER & JAMES, *op. cit. supra* note 3, at 816.

[16] Gregory, *supra* note 11.

[17] L.R. 3 H.L. 330 (1868).

[18] 2 HARPER & JAMES, *op. cit. supra* note 3, at 815.

[19] See, *e.g.*, Brown v. Collins, 53 N.H. 442 (1873); Losee v. Buchanan, 51 N.Y. 476 (1873).

[20] PROSSER, *op. cit. supra* note 9, at 332.

the highest degree of care is exercised. The problem basically may be regarded as one of allocating a probable or inevitable loss in such a manner as to entail the least hardship upon any individual and thus to preserve the social and economic resources of the community.[21] Confronted with the choice of leaving the burden where it falls on probably innocent victims or shifting it to those responsible for the blasting, the result of the principal case in placing the liability on the shoulders of industrial and commercial enterprises seems to be more just. This latter group is in a better position to predict the risk of loss involved in their conduct and absorb it through insurance and higher prices,[22] ultimately spreading the loss more equitably to the community at large.

Neal Kurn

WORKMEN'S COMPENSATION — ACCIDENT — PNEUMONIA INDUCED BY INHALATION OF FUMES.—Petitioner contracted pneumonia from inhalation of fumes while operating a tractor with a defective exhaust and cracked cylinder block. The Industrial Commission denied compensation on the ground that the pneumonia did not result from an injury by accident. On certiorari, *held*, reversed. Pneumonia, contracted by a workman as a result of defects in a tractor which he was employed to operate, is compensable as an injury by accident within the meaning of the Workmen's Compensation Act. *Dunlap v. Industrial Comm'n*, 90 Ariz. 3, 363 P.2d 600 (1961).

Pneumonia is considered a disease for purposes of compensation,[1] and as such the statute does not authorize recovery unless it follows as a direct result of an injury which qualifies independently as an accident.[2] In order to determine whether there has been an accidental injury from which the disease has followed, the court must search for an unexpected event either in the cause of the injury (the circumstances immediately preceding it), or in the result (the injury itself).[3] Under the latter theory the accidental injury may occur under the usual circumstances of the employment when the injury

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[21] 2 HARPER & JAMES, *op. cit. supra* note 3, at 787.
[22] Morris, *Hazardous Enterprises & Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952); Gregory, *supra* note 11.

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[1] 1 LARSON, WORKMEN'S COMPENSATION LAW § 38 (1952) [hereinafter cited as LARSON]; 5 SCHNEIDER, WORKMEN'S COMPENSATION TEXT § 1430 (3d ed. 1946) [hereinafter cited as SCHNEIDER].
[2] ARIZ. REV. STAT. ANN. § 23-901(8) (1956): "'Personal injury by accident arising out of, and in the course of employment' . . . does not include a disease unless resulting from the injury"; 1 LARSON § 37.30.
[3] 1 LARSON § 38; 4 SCHNEIDER § 1240.

itself is unexpected.[4] If the injury is indefinite in either its time of origin or its effect, or both (as, for example, in the inhalation of fumes), most courts hold that it must have resulted from unusual circumstances surrounding the employment before the injury will be considered compensable.[5] In other words, the accident must be found in the cause of the injury.

Arizona first adopted the view that an accidental injury occurred only where the unexpected event, happening suddenly and producing objective symptoms, was found in the cause rather than in the injury itself.[6] From this it necessarily followed that an accidental injury could arise only where there were unusual circumstances surrounding the employment.[7] This view was ultimately overruled.[8] The court has since stated that the accident may be found either in the cause or the result of the injury,[9] that the accidental injury may occur when the circumstances surrounding the employment are usual,[10] and that an injury may be accidental even though it occurs gradually,[11] if its origin is traceable to a certain time and place.[12]

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[4] See Jones v. Industrial Comm'n, 81 Ariz. 352, 306 P.2d 277 (1957) (award for routine exertion causing coronary occlusion); Phelps Dodge Corp v. DeWitt, 63 Ariz. 379, 162 P.2d 605 (1945) (award for "breakage" from routine exertion); *cf.* Vukovich v. Industrial Comm'n, 76 Ariz. 187, 261 P.2d 1000 (1953) (award for routine exposure causing heat stroke. *But see,* Jones v. Industrial Comm'n, 70 Ariz. 145, 217 P.2d 589 (1950) (award denied for amputation required by blood clot resulting from routine exposure to cold); 1 LARSON § 38.

[5] See, *e.g.*, Hartford Acc. & Indem. Co. v. Industrial Comm'n, 66 Ariz. 259, 186 P.2d 959 (1947) (kidney fell during period claimant was employed as store clerk); Dauber v. City of Phoenix, 59 Ariz. 489, 130 P.2d 56 (1942) (unexpected quantity of sewer gas where only small amount was expected); 1 LARSON § 39.

[6] Pierce v. Phelps Dodge Corp., 42 Ariz. 436, 26 P.2d 1017 (1933). Arizona adopted a portion of the Utah Workmen's Compensation Act in ARIZ. REV. STAT. ANN. § 23-1021 (1956), under which an injury had been held in Tintic Milling Co. v. Industrial Comm'n, 60 Utah 14, 206 Pac. 278 (1922), to be accidental when the unexpected event was found either in the cause or the result. In construing its own "injury by accident" clause the Arizona court reasoned that whereas "injury" always denotes a result and "accident" may denote either a cause or result, the use of the preposition "by" fixes the meaning of "accident" as the cause of the injury. See generally Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts,* 25 HARV. L. REV. 328 (1912).

[7] Rowe v. Goldberg Film Delivery Lines, Inc., 50 Ariz. 349, 72 P.2d 432 (1937).

[8] Phelps Dodge Corp. v. Cabarga, 79 Ariz. 148, 285 P.2d 605 (1955). Prior to this case the court had appeared to retreat from its earlier position, Mitchell v. Industrial Comm'n, 61 Ariz. 436, 150 P.2d 355 (1944), but it had subsequently reaffirmed its adherence to the accident-cause theory, Jones v. Industrial Comm'n, 70 Ariz. 145, 217 P.2d 589 (1950).

[9] Jones v. Industrial Comm'n, 81 Ariz. 352, 306 P.2d 277 (1957).

[10] Phelps Dodge Corp. v. Cabarga, 79 Ariz. 148, 285 P.2d 605 (1955). The court said that usual or unusual conditions were important only to convince the fact-finding body of the causal connection between the employment and the injury.

[11] Mitchell v. Industrial Comm'n, 61 Ariz. 436, 150 P.2d 355 (1944).

[12] Treadway v. Industrial Comm'n, 69 Ariz. 301, 213 P.2d 373 (1950). The court denied compensation for valley fever because it was not satisfied with the proof of the causal connection between the disease and the employment. Certainty of time of origin has also been found to be of importance in distinguishing the injury from an occupational disease. Mitchell v. Industrial Comm'n, *supra* note 11. See generally Bohlen, *supra* note 6.

In the instant case the court stated that there were three criteria which must be met to allow compensation. First, there must be an accident arising out of and in the course of employment; second, the petitioner must be injured thereby; and third, the injury or disease must be caused by conditions of the employment.[13]

It was then found that an accident had occurred because the abnormal volume of fumes emitted by the tractor constituted unusual and unexpected circumstances causing injury; that there was a causal connection between the fact of employment and the fact of injury; and that pneumonia was compensable because it was the accidental result of a combination of unusual circumstances.[14]

The court said also, without reference to the statute,[15] that any disease is compensable when traceable to a definite time and following as a natural consequence of an injury which has qualified as accidental.[16] Although the court thus acknowledged the requirement for an injury independent of the disease, it did not indicate what it considered to be the injury. Furthermore, much of the court's language suggests that "disease" and "injury" are treated as interchangeable terms.[17] If this is true, a disease is compensable if it is caused by unusual or unexpected circumstances or if it is the unexpected result of usual employment. According to this reasoning contraction of pneumonia in the instant case was the injury which was accidental by virtue of the unexpected circumstances in its cause. However, pneumonia might also be held to be compensable in a situation where there was only a usual volume of fumes accompanying the employment, assuming the pneumonia did, in fact, result from it.[18] This conclusion would necessarily follow because the pneumonia (the injury), would be the unexpected, and therefore accidental, result of the

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[13] Dunlap v. Industrial Comm'n, 90 Ariz. 3, 363 P.2d 600 (1961).

[14] Dunlap v. Industrial Comm'n, *supra* note 13.

[15] ARIZ. REV. STAT. ANN. § 23-901(8) (1956).

[16] Dunlap v. Industrial Comm'n, 90 Ariz. 3, 363 P.2d 600, 603-04 1961): "Any disease is compensable under our statute which follows as a natural consequence of any injury which has qualified independently as accidental."

[17] (a) It must be proved "that the injury or disease was caused by conditions of employment." Dunlap v. Industrial Comm'n, 90 Ariz. 3, 363 P.2d 600, 602; (b)"[P]neumonia [is the] . . . accidental result of a combination of unusual circumstances. . . ." Dunlap v. Industrial Comm'n, *Id.* at 604; (c) "[P]neumonia . . . flow[ed] directly from the unusual and unexpected conditions surrounding his employment, i.e., the defective tractor." Dunlap v. Industrial Comm'n, *Id.* at 604.

[18] Compare Dauber v. City of Phoenix, 59 Ariz. 489, 130 P.2d 56 (1942). In this case, decided before the overthrow of the doctrine of the *Pierce* case, claimant recovered compensation for ruptured stomach ulcer resulting from inhalation of sewer gas. The court said that although claimant could have reasonably expected such gas in small quantities, the appearance of the great cloud of gas which overcame him was sudden and wholly unexpected.

employment. Such a determination would be contrary to the statute[19] and to the rule stated by the court itself.[20]

Perhaps the case would have provided a stronger precedent for future claims involving pneumonia or other diseases if the inhalation of fumes had been held to constitute the injury[21] which, although not an accidental result because not unexpected, was accidentally caused by reason of the unusual and unexpected conditions surrounding the employment (that is, the defective tractor). Thus, there would be established uncontrovertibly an accidental injury from which pneumonia followed.[22]

Fred E. Ferguson Jr.

WORKMEN'S COMPENSATION — CAUSATION — MEDICAL VIEW VERSUS LEGAL VIEW.—Medical testimony, differing only as to weight, indicated that the condition under which the claimant performed his work was one factor in causing the claimant's illness. The Industrial Commission of Arizona based its finding of no causal relationship largely on the testimony of one physician who indicated that the working conditions were a "very minor" factor in producing the illness. Other doctors stated that the claimant's condition was precipitated or aggravated by the working conditions. There was an award holding the claim non-compensable. On certiorari, *held,* award set aside. The evidence of medical witnesses regarding causal factors of the illness was not conflicting, although the weight assigned to these causal factors did differ. *Mead v. American Smelting and Refining Co.*, 90 Ariz. 32, 363 P.2d 930 (Ariz. 1961).

The importance of the instant case lies in the clear distinction drawn between the legal and medical views as to causation. It is well settled that when the medical conclusion as to causation conflicts with the legal conclusion, the legal conclusion will control.[1]

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[19] ARIZ. REV. STAT. ANN. § 23-901(8) (1956).

[20] Dunlap v. Industrial Comm'n, 90 Ariz. 3, 363 P.2d 600 (1961) (quoted above at note 16).

[21] Compare Andreason v. Industrial Comm'n, 98 Utah 551, 100 P.2d 202 (1940) (award granted butcher contracting bacillus enteriditis by inhaling germs through routine handling of diseased meat); Milwaukee County v. Industrial Comm'n, 224 Wis. 302, 272 N.W. 46 (1937) (award granted nurse contracting tuberculosis in tuberculosis sanitarium).

[22] See generally 32 N.C.L. REV. 255 (1954). The author makes a plea to eliminate the accident requirement by legislation to avoid inhibition of the Acts' sociological purpose and eliminate dangerous legal rationalization.

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[1] 2 LARSON, WORKMEN'S COMPENSATION § 79.51 (1952).

Despite this general consensus among the courts in favoring this rule, the lack of a clear explanation as to the difference between the legal and medical views on causation has presented a frequent source of confusion in workmen's compensation cases, as well as personal injury litigation.[2] It has been stated that, "If one researched for a single medico-legal problem that gave the most difficulty to the doctors and lawyers alike, the doctrine of reasonable certainty is that problem."[3] Most authorities agrees that this conflict results from the doctor attempting to find the precise etiological cause and the lawyers attempt to prove an inference of reasonable certainty.[4] The extreme to which this controversy has proceeded is in the field of trauma causing injury,[5] especially cancer.[6] As a consequence of this misunderstanding by doctors as to what constitutes legal cause, some fantastic medical testimony as to causation has resulted,[7] thus sending lawyers in quest of proper examination techniques in this field.[8]

The application of the doctrine of legal cause controlling over medical opinion as to causation, in the instant case, follows the general law as well as the law in this jurisdiction.[9] As was previously stated, the highlight of this case is the forthright distinction drawn between the legal and medical views as to causation. As the court pointed out, the law endeavors to reach an inference of reasonable medical certainty from a given event or sequence of events, and recognizes *more than one cause* for a particular injurious result.[10] This is clearly distinguishable from the medical view of causation which, as has been shown, frequently leads only to the precise etiological cause.

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[2] Averbach, *Causatiton: A Medico-Legal Battlefield,* 6 CLEV.-MAR. L. REV. 209 (1957); Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation,* 31 TEXAS L. REV. 630 (1953).

[3] Koskoff, *A Primer for Medical Evidence,* MED. TRIAL TECH. Q. 89 (Dec. 1955).

[4] Averbach, *Causation: A Medico-Legal Battlefield,* 6 CLEV.-MAR. L. REV. 209, 216 (1957): "We find that the doctors, because of their training, are thinking in terms of the *exact, precise, and one and only cause* of a particular condition, while the lawyers, because of their training, are thinking not of an exact knowledge, but of the reaching of an inference of reasonable medical certainty from a sequence of facts from which that particular inference can be derived." See also: Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation,* 31 TEXAS L. REV. 630 (1953).

[5] General Motors Corp. v. Freeman, 164 A.2d 686 (Del. 1960) (Loss of eye caused by trauma); Stella v. Mancuso, 7 App. Div. 2d 657, 179 N.Y.S.2d 169 (1960) (Multiple schlerosis precipitated by trauma).

[6] Lefkowitz v. Silverstein, 11 App. Div. 2d 841, 203 N.Y.S.2d 122 (1960); For a recent list of cancer cases involving this problem as to causation, see 26-27 NAACA L.J. 265 (1960-1961).

[7] Miami Coal Co. v. Luce, 76 Ind. App. 245, 131 N.E. 824 (1921). A miner suffered severe shock, severe lacerations of the scalp, burns and two broken legs from a mine explosion. He died after laying in bed delirious for 15 days. Doctors testified that the cause of death was blocked bowels.

[8] TRIAL AND TORT TRENDS, 566-721 (Belli ed. 1955) (Trial of a multiple schlerosis case at the NACCA Convention, August, 1955).

[9] Murray v. Industrial Comm'n, 87 Ariz. 190, 349 P.2d 627 (1960).

[10] Mead v. American Smelting & Refining Co., 90 Ariz. 32, 363 P.2d 930 (1961).

In the instant case, the court applied the legal doctrine by recognizing that one doctor's testimony that other non-employment factors were more important in causing claimant's illness was not actually in conflict with the testimony of those doctors who stated that employment factors did cause the illness.[11] In other words, the court was not looking for the most important cause but for the requisite *legal* causal relationship between the illness and the conditions under which the claimant performed his work.

Concededly, the court followed the general rule as to legal cause controlling over medical conclusions as to causation. In doing so, the court has also revealed the basic source of conflict between lawyers and doctors as to the rule of legal cause. Considering the confusion amongst lawyers, as well as doctors, as to the reasons for this conflict, the court has performed a valuable service in reaffirming by reference the excellent reasoning in the case of *Murray v. Industrial Comm'n.*[12]

Paul Robert Fannin

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[11] *Id.* at 933, 934.

[12] 87 Ariz. 190, 199, 349 P.2d 627, 633 (1960) "The difference in the medical and legal concept of cause results from the obvious differences in the basic problems and exigencies of the two professions in relation to causation. By reason of his training, the doctor is thinking in terms of a single, precise cause for a particular condition."

BOOK REVIEW

A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND, by Bryce Lyon. New York: Harper & Brothers, 1960. Pp xix, 671. $7.50.

Law under any system is more than the words of statutes and written opinions. It absorbs and reflects the mores of the people, the administrative machinery for producing and enforcing law, and the evolving levels of economic and cultural progress which nourish it. Painting such a backdrop for the period 450 to 1485 has been the task of Dr. Bryce Dale Lyon, Professor of History, University of California at Berkeley, in his 1960 book, *A Constitutional and Legal History of Medieval England.*

A companion book by Professor F. G. Marcham of Cornell University, even more recently brought out by the same publishers, carries forward from 1485 to the present time. Together they supplement the collection of materials in Stephenson & Marcham's *Sources of English History* (1935).

Dr. Lyon earned his doctorate in history under Dr. Carl Stephenson at Cornell University, and taught at Illinois and Harvard before going to California. He has published several books on the development of political institutions in the Middle Ages, including the significant *From Fief to Indenture: The Transition from Feudal to Non-Feudal Contract in Western Europe,* 1957, which is Vol. 68 in the Harvard Historical Studies; and numerous articles in legal and history magazines at home and abroad. Recently he completed two and one-half years of research in England, Belgium, The Netherlands and France under Guggenheim and Belgian foundation grants, getting into profitable source material not available to earlier historians, of which material he has made extensive use.

Dr. Lyon does not have a formal training in law, and on legal interpretation will not displace such towering figures as Maitland and Holdsworth, nor is such his aim. His emphasis as a Constitutional historian, as stated in his own words, is on "the close relation between routine government administration and the development of the law courts, parliament, and various departments of state."

While Dr. Lyon has not attempted to pioneer any new doctrines in this field but rather to put together a modern synthesis of diverse materials, he at least takes sides on one controversy that has divided past interpreters, i. e., whether parliament's roots extend from the

flowering of ideas on justice, such as the Great Charter of 1215 wrested from King John, or from the necessities of royal finance in gradually letting the reins of government and the right to levy taxes slip into the hands of the Commons in exchange for grants of money. Dr. Lyon espouses the latter theory, and recurs to it often as he traces constitutional development under succeeding dynasties.

The book progresses under a logical division of six parts for each of which there is a helpful analysis by chapters in the table of contents. The frequent use of chapter conclusions keeps the main emphasis of the author in the foreground.

Part One discusses the Anglo-Saxon period from 450 to 1066. While any known administrative or legal procedures preceding the tenth century are important only as setting the stage for the Norman Invasion, the functioning of the witenagemot in the tenth and eleventh centuries is given solid discussion. This form of advisory council as a body was aristocratic and not representative. Some of its decisions were written down but most were left unwritten, to be later found by custom and reference.

Part Two covers the period of the Norman kings, from 1066 to 1154, with emphasis on the feudalization of England and the beginnings of central administration, the kingship and the curia regis. In the last analysis the Norman kings were masters without limitation, but there began a coalescence of English and Norman custom into law and the genesis of a court structure, local and central, to enforce it.

Part Three extends the Angevin period from 1154 to the demise of King John in 1216, after Magna Carta and the defeat of absolutism. There was an evolution of the curia regis into great and small councils. The foundations of a legal system were laid with royal justice beginning its rout of inferior judicial practices; and questions of finance were increasingly pressed.

Part Four carries on to the death of Edward I in 1307. It was the age of Bracton in the common law, of the first usage of the term "parliament" as applied to any meetings of the great or small council, and of increasing awareness in those bodies that giving or withholding consent to forms of taxation might become a solid right belonging to the people as an effective check on royal prerogative.

Part Five is concerned with the reigns of the Edwards II and III, and Richard II, up to 1399. The parliamentary structure of a House of Commons and a House of Lords evolved, with the latter constituting also the High Court of Parliament. There was maneuvering to tighten its control over finances, and therefore over the monarchy; and by 1399 parliament "was so firmly entrenched that neither subsequent anarchy nor despotism could destroy it. It was England to stay."

Part Six deals with the closing century of the medieval period,

of the Lancasters and the Yorks, to the 1485 ascendancy of the Tudor line in Henry VII. The chancery developed into a court of equity. Littleton gave form to land law. The House of Commons improved its control over tax legislation. The closing chapter deals with the common law and its elaboration.

In today's world we are in an era of expanding national freedoms. Colonialism and despotism as governmental forms, except in Communist-controlled areas, are disappearing as new nations leap or are being pushed into a variety of parliamentary patterns, the chief characteristics of which are unpreparedness for the task and no available transition period in which the trial and error of experience can chart a course. If Dr. Lyon's book does nothing else it demonstrates that the concept of a free democratic nation does not arrive for implementation in full bloom; that in England's case it evolved slowly over five or six centuries as the level of education and political consciousness ascended, and particularly as the administrative machinery was adapted or invented to accomplish the objectives of theory or of expediency.

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